JD–54–03
Stevensville, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CAST-MATIC CORPORATION,
d/b/a INTERMET STEVENSVILLE

and

Cases GR-7-CA-44878
GR-7-CA-45034
GR-7-CA-45171
GR-7-RC-22184

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO

Steven E. Carlson and *Jamie VanderKolk, Esqs.*
for the General Counsel.
Valerie B. Speakman and *James Holt, Esqs.*
for the Respondent.
Michael L. Fayette, Esq. for the Charging Union-Petitioner.

DECISION

Statement of the Case

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Stevensville, Michigan on September 11-13 and October 22-23, 2002. It involves numerous alleged unfair labor practice violations that purportedly occurred between mid-February to June 2002[1] in connection with a union organizing campaign undertaken by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Union). On February 21, 2002, the Union filed a petition seeking to represent various production and maintenance employees of Cast-Matic Corporation d/b/a Intermet Stevensville (Respondent or Company). On April 5, an election was conducted. The employees voted 37 to 38 against union representation. There were no void and no challenged ballots. On April 12, the Union timely filed Objections to Conduct Affecting the Results of the Election.

During the organizing campaign and immediately following the election, the Union filed unfair labor practice charges, which were subsequently amended. On May 31, 2002, an Order Consolidating Cases and Consolidated Complaint; Report on Objections; Order Consolidating Cases; Order Consolidating Union Labor Practice Cases and Objections; and Notice of Consolidated Hearing with Copy of Objections was issued. (G.C. Exh. 1(1).) The consolidated complaint alleges, among other things, that the Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of jobs and customer orders; threatening employees with discharge; threatening employees with plant closure; threatening employees that it would not install or operate equipment; promulgating and maintaining overbroad confidentiality and no-

[1] All dates are 2002, unless otherwise indicated.

solicitation rules; removing employee bulletin boards; asking employees to remove Union buttons; prohibiting employees from discussing their terms and conditions of employment; making threats of futility; soliciting employee grievances; coercively interrogating employees; creating the impression that its employees' union activities were under surveillance; promulgating new rules prohibiting employees from taking breaks in certain areas of its facility; promulgating a rule prohibiting employees from being on the Respondent's premises during nonworking hours, and telling employees the rule was due in part to employees' union activities; threatening employees with reduction in wages; unlawfully polling employees; disparately confiscating and disposing of Union literature; promulgating a rule prohibiting employees from bringing union literature into its facility; and threatening employees with arrest by local police and suspension if they brought union material into the facility.

The consolidated complaint further alleges that the Respondent violated Section 8(a)(3) of the Act by issuing documented warnings to 13 employees on or about February 15 for failing to punch in and/or out; issuing a documented warning to Employee Lisa Cogswell on February 27 for poor attitude and performance; changing the shift hours of Employee Lisa Cogswell on February 27; issuing a documented warning to Employee Tom Turney on March 7 for remaining in its facility after the shift ended and for impeding the production of others; restricting Employee Lisa Cogswell's access to the front office area on March 8; and issuing a documented warning to Employee Lisa Cogswell on March 18, and removing her working supervisor duties.

On July 29, 2002, an amended charge was filed in Case GR-7-CA-45171 and a Second Order Consolidating Cases and Amended Consolidated Complaint; Report on Objections; Second Order Consolidating Cases; Order Consolidating Unfair Labor Practices Cases and Objections; and amended Notice of Consolidated Hearing was issued. The amended consolidated complaint alleges that Respondent further violated Section 8(a)(1) of the Act by soliciting applicants to disclose their union membership by means of a written questionnaire; and by coercively interrogating applicants for employment concerning their union membership, activities, and sympathies. (GC Exh. 1 (q).)[2] The amended complaint alleges that the Respondent further violated Section 8(a)(3) of the Act by demoting and reducing the wage rate of Lisa Cogswell.[3]

The amended consolidated complaint further alleges that in mid-February 2002, a majority of Respondent's employees in the petitioned-for-unit, designated and selected the Union as their representative for purposes of collective bargaining by signing authorization petitions; that the Union by letter, dated February 20, requested the Respondent to recognize it as the exclusive collective-bargaining representative of the Unit and to bargain collectively with the Union; and that since February 20, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective bargaining representative of the Unit in violation of Section 8(a)(5) of the Act.

Finally, the amended consolidated complaint alleges that the above-referenced violations are so serious and substantial that the possibility of erasing the effects of these unfair labor practices and of conducting a fair rerun election by the use of traditional remedies is slight, and the employees' sentiments regarding representation having been expressed through authorization petitions would be better protected by issuance of a bargaining order than by

[2] At trial, the General Counsel's unopposed motion to amend paragraph's 11(c), 15(a), 22(a), and 22(b) of the amended consolidated consolidated complaint was granted. (Tr. 6-7.)

[3] In his posthearing brief at page 3, fn. 4, the General Counsel withdrew the allegations contained in paragraphs 12(f), 17(b) and 18 of the amended consolidated complaint.

traditional remedies alone.

The Respondent timely answered the consolidated complaint and its amendment by effectively denying the material allegations of those pleadings. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.[4]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Union-Petitioner,[5] I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation with an office and facility in Stevensville, Michigan, is a manufacturer of metal products for the automotive industry. During the 12-month period ending December 31, 2001, it purchased and received at the Stevensville facility, materials and supplies valued in excess of $50,000 directly from suppliers located outside the State of Michigan. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Company's Business*

Cast-Matic Corporation at one time manufactured and sold aluminum castings used in barbeque grills. In 1997, the Company was purchased by Intermet Corporation, headquartered in Troy, Michigan, and began doing business as Intermet Stevensville. In 1999, Intermet decided to phase out its iron die cast operations at Stevensville and to initiate a plan to manufacture aluminum automotive parts. In June 2000, it imported a machine ("R&D cell") from Bulgaria that would be used to research and develop a process to manufacture steering knuckles for automobiles. Soon after the "R&D cell" arrived, the Respondent began processing a small number of steering knuckles and eventually was awarded a contract to develop a process for manufacturing aluminum steering knuckles for a major automotive parts company. By April 2001, the process had been sufficiently developed to purchase actual production machines (pressure-counter-pressure or "PCP" machines), which would facilitate the increased manufacture of steering knuckles.

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[4] At the conclusion of the General Counsel's case-in-chief, the Respondent moved to dismiss the complaint in its entirely and I reserved my ruling on the motion. The Respondent renewed its motion in its posthearing brief. For reasons stated below, the motion is denied.

[5] The Respondent's motion to strike the brief of the Charging Union-Petitioner is denied. The Charging Union-Petitioner's reliance on the decision of the United States Court of Appeals for the Sixth Circuit in *Contech Division, SPX Corp. v. NLRB,* in Case No. 97-5099/5247 (1998) is not inappropriate nor does it establish a basis for striking the posthearing brief.

Joseph Barry, the Respondent's general manager, oversaw the manufacturing transition from die casting to aluminum steering knuckles. Reporting to him was Operations Manager, Valerie Ortiz. Barry and Ortiz both joined Cast-Matic in April 1996. They had previously worked together for an employer named Contech. In April 2001, Barry hired another former Contech employee, Zoe Burns, to be the Respondent's project materials manager. Burns was brought to the Company specifically to develop standard practice instructions and to train all employees for the new process.

B. *Existing Workplace Policies and Rules*

Since at least early 2001, the Respondent has had an employee handbook that it distributed to all employees containing numerous workplace policies and rules. (G.C. Exh. 3.) The 2001 version of the employee handbook had a "confidentiality statement" that restricted the disclosure of information pertaining to the plant, its customers or suppliers, as well as the release and removal of any records concerning the same. (G.C. Exh. 3, page 9.) The handbook also outlined a "Resolution Opportunity Program" that encouraged employees to discuss with management on a one-to-one basis their individual concerns dealing "with workplace conditions, conditions of employment, treatment of the employee by management, supervisors, or other employees, or the application of Company policies, practices, rules, regulations, and procedures to the employee's individual situation." (G.C. Exh. 3, pages 16-17, and Addendum 6.)

In addition, the 2001 version of the employee handbook stated that certain types of conduct may result in discipline ranging from a documented warning for a first incident to termination for a fourth incident. This conduct included being present in the facility during non-work hours without good cause; failing to punch in and out at various times during the work day; and soliciting in any form during working hours or soliciting from working employees during the employee's own non-working hours. (G.C. Exh. 3, page 14-15, Rules 3, 10 and 13.)

The enforcement of some of these rules over the years was erratic. For example, although soliciting in any form during working hours was prohibited, the unrebutted evidence shows that employees bought and sold candy and other items before and after shifts, during breaks, in and out of work areas, from and to other employees and supervisors. (Tr. 232, 271, 415.) Likewise, although the Respondent had long been aware that employees were not complying with the punch in and punch out rule (R. Exh. 66-70), very little was done to ensure compliance. (R. Exh. 63-65.)

In September 2001, the Respondent converted from a time clock punch system to an electronic card swipe system for recording the arrivals and departures of the employees. Three months later, on December 20, 2001, the Respondent posted a memo pointing out that several employees were not punching in and out, and telling everyone that the failure to do so could result in discipline.[6] (R. Exh. 4.)

On Monday, January 7, 2002, Project Materials Manager Zoe Burns sent an e-mail to her supervisor, Operations Manager Valerie Ortiz, inquiring how discipline for employees with excessive missed punches was going to be handled.[7] (R. Exh. 14.) Burns had unsuccessfully

[6] The memo was posted in the employee break room from December 20, 2001, to January 7, 2002.

[7] Burns testified that she was prompted to make the e-mail inquiry because one of the employees that she supervised, Antonio Jeffries, had failed to punch out on Friday, January 4. Burns testified that she "had had issues with him since day one when he was employed with us

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sought guidance from Human Resources Manager, Rick Swem, and eventually was told by his assistant that it was the manager's responsibility to track and discipline the employees. Ortiz disagreed and advised Burns that human resources would take care of disciplining the employees, who failed to punch in and out. (Tr. 937.) That notwithstanding, between January 7 and February 15, 2002, 10 employees failed to punch in and out, but no one was disciplined for failing to do so.

C. *The Organizing Campaign Commences*

In summer 2001, some employees informally talked about having a union at the plant. (Tr. 2.) By January 2002, there was shop talk about circulating a union petition. (Tr. 4.) By word of mouth, employees were told about a meeting at the Union hall on February 12. At that union meeting, several employees signed a Union petition that was then circulated at the plant over the next few days. (Tr. 252-253; G.C. Exhs. 2(a) and 44.)

Employee Sylvester ("Bud") Tebo heard about the Union organizing campaign from a co-worker. On Monday, February 11, he went to his supervisor, Zoe Burns, and in her office asked her if the rumors about a union were true. (Tr. 22-23.) Tebo testified that when Burns answered affirmatively, he asked her what the Company was going to do? According to Tebo, Burns told him that the Company would try to provide information to him so he could make an informed decision on whether to vote for the Union or not. (Tr. 34.) Tebo also testified that Burns told him that she had a bad experience working in a union shop and that the Company "could possibly lose business and future orders." (Tr. 22-23.)

Zoe Burns confirmed that Tebo asked her if she had heard the rumors on the floor about a union. She stated, however, that the conversation occurred on approximately February 20 and that Tebo approached her in the hallway. [8] (Tr. 949.) According to Burns, when Tebo asked her if she had heard the rumors on the floor, she responded by asking him "what rumors are you talking about," to which Tebo replied "the Union rumors." Burns stated that Tebo then asked her what the Company was going to do about it, and she told him "that I didn't have a clue what the Company was going to do at that point. I hadn't been advised as to what was happening and that was the end of the conversation." (Tr. 949.) Burns stated that she had learned the day before about the Union organizing drive from General Manager Joe Barry. Burns also expressly denied that she told Tebo that the Company could lose future business or orders.

Tebo's recollection of events and dates was rather general and somewhat vague. Although he testified twice at trial, he never acknowledged or denied[9] that he had other conversations with Burns about the Union. I question the "completeness" of his testimony, as well as whether he may have confused the rumors on the floor with what Burns actually told him. On the other hand, Burns impressed me as a detailed-oriented, very regimented, organized person. Her testimony on this issue was precise. For these, and demeanor reasons, I credit Burns' denial that she did not tell Tebo that the Company could lose future business or orders.

D. *The Respondent's Pre-Petition Conduct*

On Thursday, February 14, 2002, General Manager Joe Barry found out about the Union

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punching in and punching out. I wanted to address it." (Tr. 1030.)

[8] Burns testified that this was the first of approximately four conversations that she had with Tebo about the Union. The other conversations took place between March 11-28. (Tr. 949-951.)

[9] Tebo was recalled as a rebuttal witness. (Tr. 1208.)

organizing drive. (Tr. 1135.) Barry testified that management was hearing rumors on the floor about the Union. (Tr. 533-534.) He suspected that an organizing drive was imminent. Barry further testified that he waited until Monday, February 18, to advise corporate headquarters about the Union organizing drive. Two days later, on February 20, he had a three-way telephone conference with his boss, a corporate attorney, and the corporate human resources director seeking guidance on issues related to the organizing drive. (Tr. 1135.) In the meantime, a series of events occurred.

1. February 15, 2002

On February 15, all the bulletin boards in the employee break room were removed. Barry testified that he made the decision to remove the boards one or two days before they were removed. (Tr. 505.) He stated that he ordered the boards taken down in order to paint the room in preparation for upcoming visits by potential customers and a major audit (QS 9000) that was to take place sometime in March.

Barry told Facilities Manager David Patterson that he wanted the boards removed and the break room painted, but he did not tell Patterson why. (Tr. 802.) Patterson testified that he assumed it was because there was a customer visit coming up in early March, along with a QS-9000 audit.

Shortly after the boards were removed, Bill Atkins, a manufacturing engineer, who helps oversee facilities maintenance, was told by Patterson that the walls had to be painted. (Tr. 922.) Atkins testified that he had serious doubts that the break room could be painted and all eight boards rehung in time for the customer visit. Atkins and Janitor, Phil Lee, scrubbed a small area of a wall with spray cleaner, which improved the appearance. He then advised Barry and Patterson about his concerns, and they agreed to have the walls cleaned, rather than painted.

Phil Lee washed the walls between February 28 and March 1. The tables and chairs were also wiped down. (Tr. 921.) On March 4, all eight bulletin boards were rehung in the break room.

Also on February 15, documented warnings were issued to 13 employees[10] for failing to punch in and out.[11] (G.C. Exh. 4-16.) Many of the incidents occurred in early January 2002. For example, Employee Ed Young failed to punch in or out on January 3, 7, and 10. Employee Don Jaeschke failed to punch in or out on January 3, 2002. Employee Antonio Jeffries failed to punch in or out on January 4 and 24. One employee, Richard Hosford, failed to punch in or out on December 26, 2001.

2. February 16, 2002

Second shift foundry worker Thomas Turney was an active Union advocate, who solicited several employees on Company property to sign the Union petition. (Tr. 220, 252-253.) On Saturday evening, February 16, third shift supervisor, Dale Potter, saw Turney in the plant after the end of his shift. Potter wrote a note to Operations Manager Valerie Ortiz telling her that

[10] Bill Angelo, Ben Cribley, Bill Hager, Richard Hosford, Antonio Jeffries, Don Jeschke, Marcy Klug, Mike Meade, Larlie Miller, Randy Penley, Sylvester Tebo, Dan Wagner, and Ed Young.

[11] Although the warnings were all dated, February 15, 2002, they were given to the employees at various times between February 15 – February 21.

Turney "is staying in the company after he has punched out. I have seen him on 2-13-02, 2-14-02, 2-15-02. He is also walking around without safety glasses on. I informed him that he would have to leave. But I (sic) not sure he did. I didn't follow him to make sure he left." (G.C. Exh. 17, page 3.)

3. February 18 - 20, 2002

Kristie Cramatie is a third shift process monitor, who began working for the Respondent on October 5, 2001. She signed the Union petition on February 13 and wore a Union button on her baseball cap everyday at work. (Tr. 46.)

On February 18 and 20, as Cramatie's shift was ending, she was asked to meet with Operations Manager Valerie Ortiz in Ortiz' office. There are three different versions of who attended those meetings and who said what.

a. *Cramatie's testimony*

According to Cramatie, on February 18, she was told by Supervisor Dale Potter that Ortiz wanted to speak with her in Ortiz' office. When she arrived with Potter, Cramatie found Ortiz and Supervisor Brandon Reed waiting. Cramatie testified that behind the closed door, Reed told her that employees were no longer allowed to take breaks in the lab, which is something that Cramatie and other employees had been doing for quite some time. (Tr. 47.) Cramatie stated that Reed told her that they were asking everyone who did not work in the lab to stay out of the lab because there had been some vandalism in the plant and some excessive phone calls had been made from the lab phone. (Tr. 667-668.) At that point, Potter left the room. [12]

Cramatie testified that after Potter left, Ortiz told her that Intermet Stevensville was a nonunion shop and that as far she knew it was going to remain that way. Ortiz asked Cramatie to remove the Union button from her hat, which Cramatie did. Cramatie further testified that Reed told her that "a lot of business depended on Intermet being a non-Union shop and that if Intermet was to become unionized, we could lose business. If we lost business, we could lose jobs." (Tr. 49.) Cramatie stated that Ortiz then told Cramatie not to bring any Union literature or anything into the plant. (Tr. 50.) According to Cramatie, Ortiz also asked her if anyone was bothering her because the Company had an open door policy and she could talk to Ortiz about any problems.[13] (Tr. 51.)

Cramatie stated that two days later, on February 20, Ortiz again approached her toward the end of her shift and asked to speak with Cramatie in Ortiz' office. Behind closed door, with

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[12] Potter testified that Cramatie was told that she was not allowed in the lab unless she had reason to be there. (Tr. 837.) He conceded that employees used the lab to take their breaks, instead of the break room, and that they were using the telephone in the lab for personal calls. Potter testified that prior to February 2002, the Respondent issued a memo telling employees that they were not allowed in the lab unless they were authorized to be there. He stated that on a couple of occasions he questioned employees taking breaks in the lab, who were not authorized to be there, but he did not report or discipline them. (Tr. 853.)

[13] Cramatie testified that after the meeting she told co-worker Bill Tregoning, who also wore a Union button, that the Company was asking employees to remove their buttons. (Tr. 54.) Tregoning testified that Cramatie told some other employees that she got in trouble for wearing a Union button, but he did not remember her talking specifically to him about it. (Tr. 101.)

Supervisor Reed present, Ortiz took a Union button from her desk and asked Cramatie if it belonged to her. (Tr. 52.) When Cramatie denied that it was her button, Ortiz stated that she did not think so because she had discussed the matter with Cramatie only two days earlier. Cramatie testified that Ortiz told her that she had heard from another employee that Cramatie was passing out Union buttons. Cramatie denied passing out Union buttons, even though she had given a button to co-worker Betty Scott. When Cramatie mentioned that she had told co-worker Tregoning that the Company wanted employees to stop wearing Union buttons, Ortiz told her that she should have left their conversation in her office. Cramatie stated that Ortiz then reminded her that during her 90-day orientation, which had ended a month earlier, Cramatie had missed 2 ½ days of work, which normally would be grounds for termination. (Tr. 53.)

b. *Ortiz' testimony*

Ortiz testified that, during the February 18 meeting in her office, she asked Cramatie to remove her Union button because the Respondent had a non-union workforce and she did not want customers that were visiting the plant to be confused by employees wearing Union buttons. (Tr. 1052, 1056.) Ortiz stated that Cramatie did not have a problem with removing her Union button.

Ortiz further testified that after the February 18 meeting, an employee named Betty Scott complained that she had been harassed by Cramatie to take a Union button. (Tr. 1053.) Ortiz therefore asked Cramatie to come to her office on February 20.[14] Ortiz testified that she put the button on the table, telling Cramatie that they just had this discussion about Union buttons. She generally denied that she told any employee that they could not bring Union literature into the plant. (Tr. 1058.) An adverse inference is warranted where a witness does not deny, or only generally denies without further specificity, certain adverse testimony from an opposing witness. *Ascaro, Inc.,* 316 NLRB 636, 640 fn 15 (1995) modified on other grounds, *Asarco, Inc., v. NLRB,* 86 F. 3d 1401 (5th Cir. 1996). I find that an adverse inference is warranted based on Ortiz' failure to specifically deny Cramatie's testimony. For this, and demeanor reasons, I do not credit her denial on this point.

Ortiz also testified that during the meeting Cramatie burst into tears crying "I can't afford to lose my job … I don't want to lose my job." (Tr. 1053.) Ortiz stated that Cramatie complained that she was being harassed and that people were going to her part-time job at Radio Shack to talk to her about the Union." (Tr. 1053-1054.) Ortiz testified that she told Cramatie that she was not going to lose her job and that the Company had an anti-harassment policy. Ortiz stated that she told Cramatie that if she gave her the name of the person who was harassing her, Ortiz would arrange a meeting between the three of them to address the issue.[15]

c. *Reed's testimony*

Supervisor Brandon Reed testified that in the February 18 meeting, Ortiz asked Cramatie to remove the Union button and told her that it might send a conflicting message to

[14] General Manager Barry testified that on February 20, Ortiz advised him of the second meeting with Cramatie and wanted guidance on what to do about the Union buttons. He stated that he called corporate headquarters that day. (Tr. 1136.) The next day, February 21, he received a copy of the Union's petition from corporate headquarters.

[15] Ironically, Ortiz did not arrange such a meeting or offer to arrange such a meeting between Cramatie and Betty Scott. Rather, she called Cramatie to her office again to remind her that she was not to handout Union buttons.

customers, since Intermet Stevensville was a non-union facility. (Tr. 669.) He denied telling any employee that if the Union organized the plant the Company would lose business and close its doors. (Tr. 674.)

Reed further testified that he, Ortiz, and Cramatie met again in Ortiz' office on February 20, at which time he told Cramatie that the Company did not want employees taking breaks or eating in the lab. If they did not have work-related business in the lab, they should not be there. (Tr. 668.) Reed stated that he was attempting to improve the appearance of the lab, which he stated was a mess because employees had been taking breaks there. (Tr. 667-668, 677.) According to Reed, the conversation about taking breaks in the lab then "rolled into" the discussion about wearing Union buttons. (Tr. 677.) Reed testified that he and Ortiz asked Cramatie if she had been passing out Union buttons and Cramatie responded, "No." He stated that they decided to meet again with Cramatie because another employee (Betty Scott) had told Ortiz that Cramatie had pressured her to take a Union button. (Tr. 671.) Reed corroborated that Cramatie told them that she felt like she was being harassed herself. He added that Cramatie also told them that the only reason she wore a Union button was because she was getting harassed. Reed stated that Cramatie became very emotional, was crying, and was in fear of losing her job. Ortiz told her that her job was not in jeopardy and she was not being reprimanded.

I credit Cramatie's testimony on various aspects of the February 18 and 20 meeting. Specifically, I credit her testimony that the discussion about not taking breaks in the lab or using the phone took place on February 18, rather than on February 20. Her testimony on this point basically is corroborated by the testimony of Supervisor Dale Potter, who called her off the shop floor and accompanied her to the first meeting. In addition, I credit Cramatie's testimony that Ortiz told her not to bring Union materials into the plant. The fact that Ortiz admittedly asked Cramatie to remove her union button and not to wear it in the plant, makes it more likely than not, that she also told her not to bring any Union materials or literature into the plant. The two prohibitions as a practical matter are closely related. Also, I credit Cramatie's testimony that Supervisor Reed told her that if the Intermet became unionized, it could lose business, which could result in a loss of jobs. First, the statement is consistent with Ortiz' assertions that she was concerned that she did not want Cramatie to wear a union button because customers might infer that Intermet was, or was going to become, a unionized plant. Next, Reed did not specifically deny making that statement to Cramatie. Nor did Ortiz deny that Reed made the statement to Cramatie. Rather, Reed generally denied that he told any employee that the Company would lose business if the Union came in. An adverse inference is warranted where, as here, a witness does not deny, or only generally denies without further specificity, certain adverse testimony from an opposing witness. *Asarco Inc.,* 316 NLRB 636, 640 fn. 15 (1995). For these, and demeanor reasons, I credit Cramatie's testimony on these points.

I do not credit Cramatie's testimony that during her discussion with Ortiz on February 18, Ortiz asked her on February 18 if any employees were bothering her. Cramatie seemed unsure when this aspect of the conversation took place. On the other hand, both Ortiz and Reed testified that Cramatie told them that she was being harassed about the Union on February 20. Because their recollections on this point were consistent, I credit their testimonies about this aspect of the discussion.

d. *Other employees and Union buttons*

On February 20, Supervisor Potter approached third shift utility driver, Bill Tregoning. Tregoning testified that he was in the tool room with co-workers Mike Mead and Mike Larsen, when Potter asked him to take off his Union button. He stated, "[h]e said he was not telling me

to take the button off. He wasn't telling me to take the button off. He was asking me to take the button off." (Tr. 99.) According to Tregoning, Potter also told him that if the Union organized the plant, health insurance would increase by 50-60%. (Tr. 89.)

Co-worker Mike Meade was in the tool room when Potter walked up to Tregoning. According to Meade, Tregoning was on a forklift and he and co-worker Mike Larsen were standing near by. Meade credibly testified that he saw Potter walk over to Tregoning and that he heard him tell Tregoning, "Bill, I'm asking you to take your button off. You don't have to, but if I were you, I would take it off." (Tr. 140.) Meade further testified that Potter also told Tregoning that if a Union got in, the Company would raise the insurance premiums, and that no Union materials were allowed in the shop. At that point, Tregoning removed his Union button and everyone went back to work.

Potter testified that he "simply walked up to him [Tregoning] and I said that when Valerie [Ortiz], Joe [Barry], and management come in in the morning that if they see you with that Union button, they are not going to appreciate it." (Tr. 835, 843.) Tregoning took off the Union button. Potter denied that he asked or told Tregoning to take off the button. He also denied having any discussion with him about the Union or making any statements about what would happen to insurance premiums if the Union organized the plant. (Tr. 835.)

Potter was not a credible witness. His attempt to characterize his directive to Tregoning as a request was unpersuasive. His assertion that top management officials, like Joe Barry and Valerie Ortiz, would not appreciate seeing an employee wearing a Union button is a transparent warning that if Tregoning did not take off the button there would be ramifications. Moreover, Potter's testimony is contradicted by two credible witnesses, Tregoning and Meade. I do not credit Potter's testimony that he did not tell Tregoning to take off the Union button, that he did not tell him that the Company would raise insurance premiums if there was a Union, and that he did not tell Tregoning that Union materials were not allowed in the plant.

One other employee, Randall Penley, also testified on cross-examination that Supervisor Potter also asked him to take off his Union button. (Tr. 165.) He testified that Potter told him to remove his button in Tregoning's presence at the same time he told Tregoning to remove his button.[16] According to Penley, they took their Union buttons off together. Penley stated that Potter told him "that I'm not allowed to wear a Union button in the shop. Like, if I do not take it off, that he will have the police remove the person wearing the button and give them time off to think about whether they want to keep wearing it." (Tr. 165.)

Although Penley was called as a witness for the General Counsel, he was not asked on direct examination about Union buttons or his purported encounter with Potter. Strangely, the subject was brought up by the Respondent's counsel on cross-examination. The fact that able Counsel for the General Counsel did not ask Penley any questions about Potter asking him to remove his Union button leads me to believe that this was not an oversight. Rather, I believe that Counsel for the General Counsel was unwilling to adduce testimony at trial, which he knew or had reason to believe was untruthful.[17] While watching Penley testify, I was unconvinced that he was telling the truth and questioned, and still do, whether his testimony on this point was

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[16] The evidence shows that on February 20, which is the same day that Potter purportedly told Penley to remove his Union button, Potter gave Penley a documented warning for failing to punch in and out. (Tr. 157.)

[17] Nor did Counsel for the General Counsel rely on Penley's account in his posthearing brief. See, G.C. Posthearing Brief, pages 8-9.

motivated by the fact that he received a written warning from Potter on February 20, as well as subsequent discipline by the Company. My reservation is further compelled by the fact that Penley's testimony about his Union button encounter with Potter is inconsistent with the credible testimonies of both Tregoning and Meade. For these, and demeanor reasons, I do not credit Penley's testimony concerning a conversation that he claims to have had on February 20 with Supervisor Potter about Union buttons.

4. February 19, 2002

On February 19, Supervisor Burns gave Employee Antonio Jeffries his written 90-day evaluation. (R. Exh. 9.) The evaluation was due on December 19, 2001. According to Burns unrebutted testimony, she told Jeffries in mid-January 2002 that his evaluation was going to be late. (Tr. 948.) She stated that she was behind on evaluations.[18] Jeffries testified that when he met with Burns to go over the evaluation, she told him that it was delayed because she got busy and because of "all this Union stuff." (Tr. 188.) The evaluation, which covered the 90-day period preceding December 19, 2001, was favorable and did not reference Jeffries failure to punch in and punch out as required.

E. *The Respondent's Post-Petition Conduct*

On February 20, the Union advised the Company that a majority of its employees had signed a representation petition and sought recognition as their exclusive bargaining representative. (G.C. Exh. 24.) On February 21, 2002, the Respondent received a copy of the Union's petition. (Tr. 1136.)

1. February 22, 2002

William Shembarger is a long-time Cast-Matic employee and active Union supporter.[19] He helped circulate the Union petition, attended Union meetings, wore Union T-shirts to work, and was a Union observer at the April 5 election. On February 22, Shembarger was working the third shift in the maintenance department, when Supervisor Dale Potter approached him. According to Shembarger, Potter told him "that Val [Ortiz] had told him, if anybody was found with any union material that he was supposed to call the police or have us – have us escorted off the property." (Tr. 400.) Shembarger stated that Potter added that the employee bringing Union materials into the plant "would get two days off without pay and to give us time to think whether we really wanted the union in the shop or not." (Tr. 401.)

Shembarger further testified that Potter told him that if the Union got into the plant, the plant would shut down and that Joe [Barry] and Val [Ortiz] did not care about breaking the law – they would do whatever was necessary to keep the Union out of the shop. (Tr. 400.) Finally, Shembarger stated that Potter told him in this same conversation that if the Union got into the shop the Company would not install the R&D cell.[20] (Tr. 401.)

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[18] The evidence shows that in mid-December 2001, Burns was given a new job and new title and was made responsible for the shipping and foundry departments and the stock room. (Tr. 930.)

[19] Shembarger's father, Don Shembarger, was President of Cast-Matic immediately prior to Joe Barry's arrival at the Company.

[20] The R&D cell had been out of operation for several months. (Tr. 402.) In September 2001, it was sent back to Bulgaria by ship to be converted from a prototype to a production machine and was returned by ship to Intermet Stevensville on January 28, 2002. During the return

Continued

Potter did not dispute that he had a discussion with Shembarger about the Union.[21] He testified, however, that Shembarger brought up the fact "that he heard that the R&D cell was being moved out of the building because we were trying to get a Union in, and if it did, that the R&D cell was not going to be brought back into the building." (Tr. 831.) Potter also asserted that he told Shembarger "there was no way that it could happen that we could not - - that as a Company, we could not use that to threaten people about a Union. It was going out for repairs and that was what it was going out for." (Tr. 832.)

Potter likewise denied telling Shembarger that Ortiz had told him that if anyone brought Union material into the plant he should call the police and have them escorted off the property. (Tr. 832.) He also denied telling Shembarger that the plant would close if the Union got into the shop. He testified "I told him just exactly the opposite, that it wouldn't have no bearing on what happened in that plant." (Tr. 832.) When asked if he told Shembarger that Joe Barry and Valerie Ortiz did not care about breaking the law to keep the Union out, Potter replied, "No. Absolutely not."

Potter was not a credible witness. When asked by Respondent's counsel "did you ever have occasion during the Union campaign to talk to Bill Shembarger where the subject of the Union or the Union election was brought up?" (Tr. 831), he immediately replied, "anything that I ever talked to Bill Shembarger about the Union was he brought it up to me himself." (Tr. 831.) His answer was unresponsive to the question and unconvincing. My impression was that he had been prepped, was primed, and was very eager to put on the record that he never initiated <u>any</u> conversations with Shembarger about the Union. I am skeptical of his response.

In addition, Potter's response is inconsistent with the evidence showing that he, and not Shembarger, initiated the February 22 conversation. According to Shembarger's unrebutted testimony, he was welding on a furnace when Potter approached him. (Tr. 400.) Potter did not deny that he interrupted Shembarger while he was working. Why would a supervisor interrupt an employee who was working, unless he had something to say to the employee? Moreover, when Potter was asked specifically "how did those conversations come about?" he was incapable of explaining how the conversation arose. (Tr. 832.) Instead, he replied, "He just – I don't know. He just brought it up out of the blue, just started talking about it, you know. I don't know. I didn't that bring it up. He was the one that started taking about it." (Tr. 833.) I find that Potter's explanation is unpersuasive.

Other parts of Potter's testimony about the February 22 conversation are equally unconvincing. For example, Potter emphatically denied that he told Shembarger that the Company would close the plant and that Barry and Ortiz did not care about breaking the law. Yet, the credible evidence shows that only two days before, he asked Tregoning, in the presence of Meade, to take off his Union button and implied that if he did not, the same managers, Barry and Ortiz, would be upset. The credible evidence also shows that he told Tregoning not to bring any Union materials into the plant. Thus, the remarks attributed to Potter by Shembarger are consistent with the remarks Potter made to Tregoning two days earlier, which further taints Potter's credibility.

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voyage, the machine became severely rusted and laid on its side idle. On occasion, the maintenance mechanics would borrow parts from the R&D cell to fix one of the other PCP machines.

[21] Potter testified that at the time of their conversation he was aware that Shembarger was a Union supporter. (Tr. 841.)

Finally, Potter's assertion that he explained to Shembarger that it would be unlawful for the Company to threaten employees and that the Union drive would have no bearing on what happened in the plant is inconsistent with his prior statements. Again, only two days earlier, he implied to Tregoning that there would be ramifications if he did not remove his Union button and threatened that Barry would increase the cost of insurance premiums, if the Union was selected. For these, and demeanor reasons, I find that Potter's testimony concerning the February 22 conversation is not credible.

Shembarger's testimony on the other hand was credible and straightforward. His testimony was also consistent, even though he had just finished the night shift and was visibly very tired, when he was called to testify at trial. I credit Shembarger's testimony concerning his conversation with Potter on February 22.

2. February 26, 2002

a. *The stockroom break-in*

Lisa Cogswell was a stockroom technician/working supervisor on the first shift. She had worked several years for the Respondent. On February 26, Cogswell had difficulty closing the door to her stockroom office. Upon close examination, she saw that the doorframe was bent. Suspicious, Cogswell surveyed her office and found that a list of employees was missing. (Tr. 476.) She reported the incident to management.

b. *Tom Turney is counseled for remaining in the plant*

Employee Tom Turney was an active Union supporter. He attended union meetings, distributed Union literature, and circulated the Union petition inside the plant. (Tr. 228, 253-253.)

At approximately 11:35 p.m. on February 26, Tom Turney was in the plant – five minutes past the end of his shift. (Tr. 237.) Turney testified that he had taken the "last piece" parts at the end of his shift across the plant to the tool room where they are normally placed on a table. Because the table was full, he placed the parts on the tool box of third shift employee, Mike Larson, which prompted a conversation between Turney, Larson, and another third shift employee, Mike Meade, about the Union. (Tr. 239.)

A few minutes later, second shift supervisor, Jon Brant, entered the tool room and asked Turney if he was on overtime. Turney responded, "No." According to Turney, Brant then stated "Well, you're not to be in this plant, because I've heard about you."[22] (Tr. 239.) Turney left the tool room. A few minutes later, he went to Brant's office to explain why he was in the tool room past the end of his shift. Brant told Turney that he could have dropped off the last pieces earlier in his shift. According to Turney, Brant also asked Turney what he and the other employees were discussing to which Turney replied "none of your GD business." (Tr. 241.) Brant wrote a note to Ortiz detailing what had occurred. (G.C. Exh. 17, page 2.) His written rendition is consistent with Turney's testimony.

The following day, Turney went to Ortiz' office to talk about what happened the night before. He told her that he felt like he was being singled out and that there were supervisors following him around because they did not trust him. (Tr. 242.) Turney testified that Ortiz responded that "due to the vandalism and the Union campaign, that they were watching people

[22] Brant testified that Operations Manager Ortiz had told him to "watch the floor." (Tr. 867.)

to make sure they knew where they were at and what they were doing." (Tr. 242.) She also reminded him that he was required to leave the plant at the end of his shift. Turney stated that Ortiz also told him that it "was a non-Union plant, and it was going to remain that way." (Tr. 243.) He replied that she had her opinion and that he had his opinion.

Ortiz testified that she told Turney, "Tom, you understand we've had vandalism, we've had break-ins. So understand that it's really in your best interest for you not to be in here." (Tr. 1116.) Ortiz did not deny telling Turney that the Union campaign was another reason that he was required to leave the plant. She also did not deny telling Turney that it was a non-Union plant and it was going to stay a non-Union plant.

c. *No breaks in the shipping department*

Foundry employee, Henry Baker, has worked for Cast-Matic/Intermet for over 27 years. For more than five years, he took his breaks in shipping department. (Tr. 348.) Baker credibly testified that shortly after the Union began organizing, Shipping Department Supervisor Ricky Arthur[23] told him and co-employee Bill Graham that they no longer were allowed to take breaks or lunch in the shipping department.[24] Baker further testified that he asked why, Arthur told him that Valerie Ortiz would not allow them to take their breaks there anymore. (Tr. 348, 357.)

Utility Driver Jerry Neville has worked for Cast-Matic/Intermet for over 12 years. He had been taking his breaks, along with Henry Baker, in the Shipping Department for six or seven months. Neville testified that sometime in February 2002,[25] he was on his way to take his break in shipping when Supervisor Ricky Arthur told him that Valerie Ortiz had said that he and the others were not allowed to take their breaks in shipping anymore. (Tr. 367.)

Arthur testified that there were a couple of employees who normally took their breaks in the shipping department. By February 2002, however, more employees started to take their breaks there. (Tr. 714.) He did not deny telling the employees that they were not allowed to take their breaks in the shipping department and he did not deny telling them that Ortiz had said that they were not allowed to take their breaks in the shipping department anymore. Nor did he testify that he gave them any other reason for not allowing them to continue to take breaks in that department.

At trial, however, Arthur testified that the employees were prohibited from taking their breaks in the shipping department because of vandalism. He stated that in "March, February or March" someone tampered with the lock on his office door. (Tr. 712.) He did not notice the scratches on the doorframe until an employee pointed them out to him. He was unsure whether someone attempted to break into his office during the day or on the evening shift, but conceded that during the day his office is unlocked and during the evening other people had keys to his office. (Tr. 719, 726.) Arthur further testified that after the scratches on the doorframe were brought to his attention, he realized that some files had been removed his office and that his computer had been moved. (Tr. 713.) He also lost some information on his computer, but could not determine whether this took place at his computer terminal or from a computer terminal

[23] At the time, Ricky Arthur's official title was "Shipping Group Leader."

[24] Baker also testified that beginning in early February 2002, Employees Bud Tebo, Dave Block and some other employees began taking their breaks in the shipping department. (Tr. 354-355, 356.)

[25] Neville could not recall specifically the date that Arthur told him to stop taking breaks in the shipping area. (Tr. 366.)

located at another location in the plant. (Tr. 719.) Arthur testified that he reported the incident to Operations Manager Valerie Ortiz, who allowed him to change the locks on his office door and agreed that employees should no longer take breaks in the shipping department. A few days later, on February 27, 2002, Ortiz had photos taken of Arthur's office doorframe. (R. Exh. 2.)

4. February 27, 2002

a. *Cogswell receives a documented warning*

Stockroom Technician Lisa Cogswell was a close friend of Union supporter/advocate, Bill Shembarger. The two had car-pooled to and from work for several years, when Shembarger worked on the first shift. (Tr. 447.) In order to accommodate their car pool schedule, Cogswell for years was allowed to work a non-normal first shift of 6:30 a.m. – 3:00 p.m. After Shembarger switched to third shift in the summer 2001, Cogswell was allowed to continue working the non-normal hours of 6:30 a.m. – 3:00 p.m.

On February 27, Cogswell arrived at the plant very early at approximately 5:00 a.m. She testified that she decided to come in early because of inclement weather. Before punching in, she went to the break room, got a hot chocolate, and went to the maintenance department, where Shembarger worked. Cogswell testified that she was checking to see if Shembarger and co-worker Louie Miller needed any parts. Since they were about to go on break, Cogswell walked with them to the break room.

A short time later, third shift Supervisor Charlie Goldfuss reported to Zoe Burns, who supervised Cogswell, that Cogswell was in the plant at approximately 5 a.m., walking through the maintenance department talking to employees.[26] (Tr. 955.) When Burns asked Cogswell why she was in the plant 1 ½ hours prior to the start of her shift, Cogswell told her she was checking with maintenance to see if they needed any parts or if any machines were down. (Tr. 955.) Burns reminded Cogswell that there was a third shift stockroom technician, who was in the plant to perform that function. She also told Cogswell that she would be given a written warning for being in the plant early.[27]

Later that day, at 3:00 p.m., Supervisor Burns called Cogswell to her office, and in the presence of Ortiz, issued her a written warning for being in the facility during non-work hours without a good cause and restricting/retarding the production of others. (G.C. Exh. 18.) Cogswell testified that Burns told her that she could not be in the plant outside her normal hours because if there was a fire they would not know that she was in the plant. (Tr. 439-440.) Cogswell further testified that Burns told her she was impeding the production of Bill Shembarger and that she should not talk to Shembarger. (Tr. 440.) Burns testified that she knew that Cogswell had been talking to Shembarger, but denied that she told Cogswell not to talk to Shembarger. [28] (Tr. 1019, 960.) Rather, she stated that she told Cogswell that she was

[26] G.C. Exh. 15 reflects that Goldfuss was a supervisor.

[27] Cogswell, who began working for Cast-Matic in January 1992, had never been disciplined before February 27, 2002. (Tr. 433, 448.)

[28] Burns maintained a diary of incidents involving Cogswell. (G.C. Exh. 90.) The diary entry, dated February 27, 2002, which purportedly was made on that date, specifically states that Cogswell "accompanied Billy Shembarger around the plant talking to him." Given Burns' penchant for detail, and the fact that Shembarger is specifically identified in the diary as the person to whom Cogswell was talking, it is more likely, than not, that Burns specifically mentioned his name in her conversation with Cogswell.

not to restrict or retard the work of people on the clock. (Tr. 960.) Ortiz, however, did not corroborate this aspect of Burns' testimony. Based on the evidence viewed as a whole, and for demeanor reasons, I credit Cogswell's testimony that Burns told her not to talk to Shembarger.

When Burns asked Cogswell to sign the warning, Cogswell remarked that Burns "might as well have a rubber stamp" with her name on it, alluding to the fact that some employees had recently received warnings from Burns for not punching in and out. Burns thought Cogswell's comment was disrespectful and told her so. (Tr. 958.) Ortiz testified that Cogswell became belligerent, so she asked Cogswell if she needed a few days off to think things over. (Tr. 1062.) Cogswell replied, "No."

At that point, and without any prompting by Burns or Ortiz, Cogswell stated that she opposed the Union. (Tr. 475, 491, 1062.) Cogswell testified that she made the comment because she felt that she was receiving a warning because management thought that she supported the Union. (Tr. 491.) Ortiz testified that she did not know whether or not Cogswell supported the Union.[29] (Tr. 1063.) Burns stated that Cogswell had not done anything to indicate support for the Union. (Tr. 960.) When Burns asked Cogswell what her comment had to do with their meeting, Cogswell again stated that she did not support the Union. Ortiz and Burns told her that the Union had nothing to do with the warning.

b. *Cogswell's hours are changed*

On the same day, February 27, Cogswell received a memo from Burns stating that "[b]eginning on Monday, March 4, 2002 your work hours will be changed back to the normal 1st shift work hours of 7:00 am – 3:30 pm." (G.C. Exh. 19.) Neither Burns nor anyone else in management told Cogswell why her hours were being changed after almost five years. (Tr. 447.)

5. March 6, 2002

On March 6, 2002, the Respondent issued a memo to all employees, which stated:

> In the past, we have discouraged employees from wearing/displaying buttons/badges/attire of a controversial nature in an effort not to interfere with customer relations.
>
> However, given our understanding from INTERMET Corporate Human Resources, employees are permitted to wear buttons/badges and other Insignias in support of or opposition of a labor organization.
>
> As most of you know, recently we have had sabotage, breaking into Offices, as well as defacing Company property. Given such destructive occurrences, we will, as in the past, continue to enforce our policy regarding any Company property, machinery, and equipment defacing as defined in the INTERMET, Stevensville Plant, Employee Handbook under Standard Shop Rules and Regulations.

The memo was also read to the employees at employee meeting held on March 7 and 8. (Tr. 1120.)

[29] Cogswell testified that she did not begin supporting the Union until March 2002. (Tr. 437.)

On the same day, March 6, third shift Employee Tregoning placed Union flyers on a table in the break room during his first break of the night. (Tr. 90, 103.) When he returned at lunchtime, the Union materials were in the trash. Tregoning placed more Union flyers on the table and went back to work. When he returned for his second break, he found the Union flyers in the trash again. Tregoning put out more Union flyers and walked out of the break room. As he was walking toward the rest room, he passed Supervisor Potter going in the opposite direction toward the break room. (Tr. 92.) Tregoning testified "I got kind of suspicious, you know, so I turned around and waited a couple of minutes, you know, while he was in there. I walked in behind him and he was throwing it in the dumpster or the trash can." (Tr. 92, 105.)

Potter denied throwing away any Union literature in the break room. (Tr. 830.) Although he conceded that he had seen literature in the break room, Potter testified that he was not sure what it was. He explained that "when we was having a quality audit, I went into the break room, and I was informed that they could come out on any shift, so I went into the break room and there was a lot of clutter laying around on the tables and stuff, and I picked everything up and threw it in the garbage." (Tr. 830-831.) Potter asserted that he did not "read anything" and did not know whether it was pro-Union or pro-Company literature that he threw away.

Potter's testimony is unpersuasive. He did not deny that he threw away the Union literature three times in one night which makes it more likely, than not, that he saw what he was throwing away. He also did not deny that Tregoning entered the break room the last time and actually saw him throwing the Union literature in the trash. Moreover, there is no evidence that the Respondent placed pro-Company literature in the employee break room, so there is no basis for him to speculate that it may have been pro-Company literature that he threw away. In addition, Potter's testimony that he was simply trying to cleanup the place is dubious. Contrary to the impression that he sought to foster, he testified that when he found some Union literature lying on the floor in the bathroom, he did not pick it up and throw it in the trash. (Tr. 830.) For these, and demeanor reasons, I do not credit Potter's testimony that he did not know that he was throwing Union literature away or that he was justified in throwing the Union literature away by the possibility that there could be a night time visit from the audit team.

6. March 7, 2002

On March 7, Employee Tom Turney was given a written warning by Supervisor Brandon Reed for remaining in the plant on February 27 beyond the end of his shift. When Reed handed him the warning, Turney reminded Reed of an earlier conversation that they had after Turney was verbally warned by Supervisor Brandt about leaving the plant on time. Turney testified that at that time he told Reed that he was concerned that he might be written-up. (Tr. 247.) Reed responded that so long as Turney continued to punch out on time he would have nothing to worry about. Turney further testified that in their earlier conversation Reed also told him that he was not aware of any employee being disciplined for remaining in the plant past the end of his shift. (Tr. 247.) According to Turney, on March 7, that all changed when Reed gave him the written warning telling him that he was required to remain true to Company policy and that another employee, Lisa Cogswell, had received a similar write-up. (Tr. 248.)

7. March 8, 2002

On March 8, Employee Lisa Cogswell was called to the conference room by her supervisor, Zoe Burns. (Tr. 449.) Burns gave Cogswell a memo addressed solely to Cogswell stating that the Company was "reducing the amount of front office traffic" and that "[t]he only time you should be in the front office is during a scheduled meeting, when asked to come to the front office for a discussion or to meet with a vendor in the lobby." (G.C. Exh. 20.) Certain job

functions normally performed by Cogswell in the front office like printing purchase orders and photocopying were to be undertaken in other departments.

Burns testified that the decision was made to reduce the front office traffic because offices had been broken into and computers had been tampered with.[30] (Tr. 961.) She testified that "we had break-ins in the Shipping Department, the stockroom. I had personally had my computer files deleted off the computer, and there had been previously, at the end of the year before, we had had a couple of break-ins and money stolen out of the front office."[31] (Tr. 963.)

8. March 15, 2002

Employee Mark Cook testified that on March 15, he wore a Union T-Shirt to a meeting called by the Company to oppose the Union. (Tr. 200.) Cook stated that the shirt read, "Vote UAW or my way or the highway," which was a reference to a statement made by General Manager Joe Barry in an earlier meeting about the Union. (Tr. 199.)

Cook testified that Barry noticed him enter the room on March 15 wearing the shirt and commented that he had been misquoted again. Cook further testified that during roll call, Barry remarked that Cook was present.

According to Cook, later that day, he was in the shipping area, when Supervisor Ricky Arthur stopped him and stated, "You better watch what you're doing. Joe Barry is out to fire you again." (Tr. 202.) Cook testified that Arthur told him that he had come from a meeting where Barry commented that he had followed Cook around for an hour.

No employees were called to corroborate Cook's testimony. Not one testified that they heard Barry make the statement "my way or the highway" or that Barry remarked that he had been misquoted again. Since this was an employee meeting called by the Respondent, one would expect that at least one other employee in attendance would have heard the comment attributed to Barry by Cook, if it had been made. In contrast, Supervisor Burns stated that she attended two or three meetings conducted by Barry, one of which was attended by Cook, but did not recall Barry making a comment about a shirt Cook was wearing. (Tr. 996.)

In addition, and more importantly, Supervisor Arthur credibly denied that he never had the conversation with Cook and that he never discussed Cook with Barry. (Tr. 717-718.)

For these, and demeanor reasons, I do not credit Cook's testimony that Barry commented on his Union shirt and that subsequently Arthur told Cook to watch himself because Barry was out to fire him.

[30] Ironically, Cogswell was told that she should begin printing purchase orders from the Shipping Department office. The same location, where only a week or so before, Supervisor Ricky Arthur placed new locks on his office door and banned employees from taking their breaks because he was concerned about "vandalism."

[31] On cross-examination, Burns admitted that the files deleted from her computer were public files, accessible and shared by other employees, and that they could have been deleted from a computer terminal anywhere in the plant. (Tr. 1038.)

9. March 18, 2002

On March 18, Project Materials Manager Zoe Burns gave Employee Lisa Cogswell a formal written warning for poor performance and poor attitude.[32] (G. C. Exh. 21.) The written warning specified six performance related incidents that occurred in January and February 2002, some of which dealt with her "unwillingness to assist other employees when asked to do specific stockroom related tasks." (G.C. Exh. 21, page 1.) For example, it reflected that Cogswell did not return uniforms and safety glasses to the stockroom in January 2002; did not research the reasons for expedited delivery charges for items shipped; and did not thoroughly clarify for Burns inventory adjustments. (Tr. 453-454, 966.) The written warning also stated that Cogswell's attitude was a major concern. Specifically, it stated "[t]he negativity and rudeness you are generating is creating issues not only in the department but in the plant as well and must cease immediately." (G.C. Exh. 21, page 1.)

The latter remarks were not unfamiliar to Cogswell. Two of her past performance reviews indicated that her ability to get along with co-workers needed improvement. (R. Exhs. 23 and 24.)[33] In her June 1998 performance review, Ortiz, who was then her supervisor, wrote "Learn to work with coworkers, including plant floor … Lisa & Jody must settle their differences too much conflict is affecting both job responsibilities and people on the floor." (R. Exh. 23, page 2; Tr. 977.) In her December 2000 performance review, Ortiz wrote "With Lisa almost everyday is a bad day. Nothing goes right, everything is wrong. Lisa works well with myself, but is rough around the edges when it comes to working with her customers – plant wide – her approach is sharp at times, and it is hard for people to work with her." (R. Exh. 24, page 1; Tr. 978.) Despite these comments about her attitude, the quality of Cogswell's work was consistently rated above average and she was never disciplined for her inability to get along with others. (Tr. 1009, 1113.)

In December 2001, Burns became Cogswell's supervisor. Almost immediately, Burns reprimanded Cogswell for being disrespectful to her and cautioned Cogswell to treat her in a respectful and professional manner. (Tr. 489; 953-954.) Afterwards, their working relationship deteriorated. Cogswell stated that Burns treated her poorly. (Tr. 488.) Burns stated that Cogswell starting playing games to deliberately avoid communicating with her. (Tr. 954.) Burns testified that "[e]very time that something would happen that I would correct her behavior or tell her that something was wrong, something would happen that she would do either by playing games or what I personally thought was in retaliation for me saying something to her." (Tr. 974.)

Ortiz was present when Burns gave Cogswell the written warning on March 18. The discipline rendered Cogswell ineligible to receive a pay increase at review time and also made her ineligible for promotions. Significantly, it removed Cogswell's working supervisor duties and placed her on a 60-day review. The written warning stated that "[a]t the review of Lisa's performance/attitude in 60 days it will be determined if she qualifies to remain in the stockroom, a decrease in pay to compensate for work or if she will remain an employee of Intermet." (G.C. Exh. 21, page 2.)

After Burns read the written warning to Cogswell, she handed her a copy, and told her not to discuss her personal business with anyone. (Tr. 974.)

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[32] The formal warning was dated, March 14, 2002.

[33] R. Exh. 23 and 24 are Cogswell's performance evaluations for 1998 and 2000, respectively. Her performance evaluations for 1999 and 2001 were not offered or placed into evidence.

As stated before, in September 2001, the R&D cell was shipped to Bulgaria to be converted from a prototype machine to an actual production machine. When it returned to the plant in January 2002, the R&D cell was covered with rust from the salt-water air. It lay idle, on its side, under a tarp for almost two months. By March, rumors were circulating throughout the plant that the R&D cell was going to be removed and, if the Union was selected, it would not return. (Tr. 42, 332.)

In early March, Facilities Manager Dave Patterson contracted with C&E Machine Services, Inc. to disassemble the R&D cell, remove the rust and corrosion, and reassemble it. (Tr. 695.) The job was to take approximately 7-10 days to complete. (Tr. 699.)

Patterson then contracted with Robinson Cartage Company to pickup the machine, take it to the C&E facility in Fennville, MI., and bring it back to the plant after it had been overhauled. (Tr. 795.) Acting on General Manager Barry's instructions, Patterson told Robinson Cartage that the truck drivers were not to discuss where the machine was going with the Intermet employees. (Tr. 797.) To ensure compliance with these instructions, the Robison Cartage invoice stated "DO NOT DISCUSS WHERE THIS MACHINE IS GOING WITH THEIR PERSONNEL @ INTERMET !!!!!!!." (G.C. Exh. 28.) The move was scheduled for March 20.

On March 20, rumors and speculation prompted some employees to inquire as to where the R&D cell was going. [34] Employee Bud Tebo stated that when he asked Supervisor Preston Estep were the machine was going, Estep told him it was going out for repairs.

Employee Antonio Jeffries testified that he asked Shipping Supervisor Ricky Arthur where the R&D cell was going and was told that the Respondent was moving it out to scare the employees. (Tr. 189.) Arthur denied making that statement. (Tr. 716.) He testified that he and Jeffries once had a conversation about some die casting machines that were being removed to make room for PCP machines and that was the only discussion that they had about removing machines. He denied ever telling Jeffries that the R&D cell was being removed in order to scare the employees. (Tr. 716-717.) For demeanor reasons, I credit Arthur's denial on this point.

Robert Armstrong a.k.a. "Rigger Bob" was the Robinson driver who came to pickup the R&D cell. Although he had moved machinery for the Respondent 12-15 times, he testified that this was the first time he had ever been told not to discuss with personnel where the machine was going. (Tr. 183.) Employee Ed Young testified that when he asked Rigger Bob where the machine was going, Bob told him that he was not allowed to say anything about it. (Tr. 286, 310.)

It took C&E Machine Service about seven to ten days to finish refurbishing the machine. (Tr. 699.) Mike Perkins, a co-owner of C&E, called Patterson to tell him that the machine was done and that it needed to be picked up soon because the C&E's lease had not been renewed and they had to move. (Tr. 698, 700.) Patterson told Perkins that Intermet was not ready to take the machine back and therefore Intermet agreed to pay C&E an additional sum of money to store it for a week or so. (Tr. 701.) The Respondent paid C&E an additional $500 to keep the

[34] Employee Bing Crosby testified that he and Bill Shembarger were asked to clear an aisle. When he asked Facilities Manager Patterson if something was coming into the plant, Patterson responded, "yeah" and dropped the subject. Crosby thought that the response was odd because Patterson was usually more forthcoming with information. (Tr. 322.)

machine until it was returned to the plant. (G.C. Exh. 36.)[35]

On April 12, Patterson called Perkins and arranged to inspect the machine on April 15. On April 22, Robinson Cartage picked up the R&D cell and returned it to the plant.

11. March 21, 2002

Even after the R&D cell left the plant, its destination was still the topic of speculation. Employee Shembarger testified that on the evening on March 21 he told Supervisor Potter that he regretted that the machine was removed because the maintenance department had used it for spare parts to repair other machines. (Tr. 405.) According to Shembarger, Potter remarked that Ortiz had told him two weeks earlier that the machine was being moved to another plant. (Tr. 405.)

Employee James McPeak testified that he and co-worker Tony Ricketts had a conversation with Supervisors Potter and Brant during which Brant stated that "if the Union was voted in, they wouldn't put in the R&D cell." (Tr. 120.) Brant could not recall having such a conversation with McPeak, Ricketts and Potter. (Tr. 862.) Potter denied that the conversation ever occurred. (Tr. 836.) Co-worker Ricketts stated that he was not a part of such a conversation. (Tr. 899.) Rather, Ricketts testified that before the R&D cell was removed, Brant told him that it was going out to be repaired. (Tr. 905.) Based on the testimonies of Ricketts and Potter, I do not credit McPeak's testimony on this point.

12. March 23, 2002

In the middle of March, the Respondent's supervisors began distributing anti-union literature to the employees as they punched out at the end of their shifts. Employee Lisa Cogswell testified that about two weeks before the union election, Supervisors Preston Estep and Ricky Arthur were passing out anti-union literature in the hall a short distance from the time clock. She stated that when she attempted to walk away without taking the literature, Supervisor Estep called out her name, came after her, and handed her the literature. (Tr. 467.) Estep did not deny that the incident occurred nor was there any evidence submitted to rebut Cogswell's testimony. Rather, Estep testified that he did not remember calling or chasing after Cogswell nor could he recall whether she declined to accept the literature. (Tr. 756.) An adverse inference is warranted where a witness does not deny, or only generally denies without further specificity, certain adverse testimony from an opposing witness, which the witness was in the best position to deny. *Ascaro, Inc.,* 316 NLRB 636, 640, fn. 1 (1995). An adverse inference is warranted here. In addition, and for demeanor reasons, I credit Cogswell's testimony concerning this incident.

13. March 26, 2002

On March 26, the Company posted a notice rescinding its policies regarding solicitations and distributions contained in the employee handbook. (G.C. Exh. 3C.) The posted notice stated:

> On pages 15 and 36 of your employee handbook there are references to the company's policy regarding solicitations and distributions. In order to make clear the company's position regarding solicitations and distributions, we ask that

[35] The union election was conducted on April 5, 2002.

you disregard the aforementioned references in your employee handbook and observe the following to be the company's position regarding solicitations and distributions:

> "Distribution of literature to employees during working time and in working areas is prohibited.
>
> Solicitation of employees during working time is prohibited."

14. March 28, 2002

On March 28, General Manager Joe Barry issued another memo amending the employee handbook. It stated:

The Intermet Employee Handbook is amended as follows:

The Confidentiality Statement on pages 9 and 10 of the Employee Handbook is deleted and is replaced by the following revised Confidentiality Statement:

"CONFIDENTIALITY STATEMENT"

> All Intermet Stevensville plant records and information relating to Intermet Stevensville customers and suppliers and all Intermet Stevensville plant records and information relating to shipping, pricing and production processes at the Intermet Stevensville plant are confidential. Records and information include but are not limited to conversations, documents, notes, files, records, computer files or similar materials. No confidential information as defined above may be removed from Stevensville plant without permission from Stevensville managers.

Work Rule 28 located on page 16 of the Employee Handbook is deleted and is replaced by the following Work Rule 28:

Work Rule 28

> Removal of confidential company records and information, as defined in the Company's Confidentiality Statement or unauthorized access or release of confidential information as defined in the Company's Confidentiality Statement contained herein, is prohibited.

The "Resolution Opportunity Program" on pages 16 and 17 of the Employee Handbook is deleted and is replaced by the following revised "Resolution Opportunity Program";

"Resolution Opportunity Program"

> Employees as encouraged to bring their concerns about work-related situation to the attention of management through the

> "open door" atmosphere, where the manager and employee can address a concern without fear of reprisal.
>
> If the employee believes that his or her concern would best be addressed using a more formal procedure, he or she may use the following process to seek management review of his or her concern. This procedure is documented in Addendum 6, Resolution Opportunity Program.
>
> The Resolution Opportunity Program is used to resolve concerns dealing with workplace conditions, conditions of employment, treatment of the employee by management, supervisors or other employee, or the application of company policy , practices, rules, regulations, and procedures to the employee's individual situation. It is not used for the determination of wages or for non work-related concerns. There will be no retaliation or reprisal or for an employee who uses the Resolution Opportunity Program.

Addendum 6, to the Employee Handbook, "Resolution Opportunity Program, is amended as follows:

> Deleted Section B "Representation" in its entirety.
> Section C "Procedure" shall be re-lettered as Section "B." The remaining text of Addendum 6 shall remain intact as presently written.

15. March 29, 2002

a. *The time clock comment*

Employee Shembarger testified that on March 29, as he was approaching the time clock at the end of his shift, Supervisors Dale Potter and Gale Wall were passing out anti-union literature. (Tr. 601-602.) According to Shembarger, Operations Manager Valerie Ortiz walked through the area and stopped to talk with Wall. Shembarger testified that as other employees walked by accepting the literature, he was approached by Wall and Potter, but declined to take the literature telling them he "had plenty of that stuff at home, and [he] already knew how [he] was going to vote." (Tr. 602.) Shembarger stated that at that point Ortiz stated, "mark that down" and left the area.

Wall testified that she and Potter passed out Company literature. (Tr. 789.) She recalled an occasion where Shembarger refused to accept the literature, but did not recall hearing Ortiz state "mark that down." (Tr. 790.) She stated that she was never instructed by Ortiz to keep track of employees who refused to accept Company literature. Potter testified that Shembarger refused to accept Company literature several times. He did not recall Ortiz being present at anytime Shembarger refused literature. Potter also testified that he was not marking anything down. (Tr. 834.) Ortiz testified that she did not remember an incident where Shembarger refused to accept a flyer from Wall. (Tr. 1059.) She also denied instructing the supervisors to make note of any employee who refused to accept Company literature.

Shembarger testified that there were other employees standing in line waiting to clock out when this incident occurred, including Employees Ron Wagner and Mike Meade. (Tr. 605.)

It is reasonable to expect that at the end of a shift as employees were heading to the time clock at least one other person would have heard the comment attributed to Ortiz, if it had been made. Yet, no one except Shembarger testified that they heard Ortiz say "mark that down." No one corroborated Shembarger's testimony on this point. Meade was a witness for the General Counsel, but was not asked about this time clock incident. Where, as here, a party fails to elicit evidence from a witness whose testimony reasonably would be assumed to favor that party, an adverse inference can be drawn that had the witness been questioned about the matter the testimony would have been unfavorable to the party's cause. *International Automated Machines,* 285 NLRB 1122, 1123 (1987). For this, and demeanor reasons, I decline to credit Shembarger's testimony on this point.

b. *The possible loss of wages*

Employee Randall Penley testified that at end of his shift on March 29, Supervisor Dale Potter told him to report to Ortiz' office. (Tr. 155.) Penley initially testified that Ortiz told him in the presence of Potter that "the Finishing Department was going to be a lower paying job, that they had an arbitrator arbitrate that job at $11.00 an hour, and I was going to lose anywhere from $2.00 to $2.30 an hour if the Union came in." (Tr. 156.) Seconds later, he testified that Ortiz told him, "[t]hat if the Union got voted in that I was possibly going to lose at least $2.00 an hour or more." On cross-examination, Penley testified that Ortiz had a piece of paper in her hand stating basically what he had stated. (Tr. 160.) He was asked by Respondent's counsel if "the paper said on it if the Union comes in, the arbitrator was going to make your wage rate less. Is that right?" (Tr. 161.) Penley responded, "It did not say that it is going to. It said it could." Penley testified that in terms of the meeting in Ortiz' office, all that was discussed was what was on the paper. (Tr. 162.)

Ortiz admitted that she had a meeting with Penley in her office and that Supervisor Potter was present. She testified, however, that she read verbatim from a document entitled, "The Grass Is Not Always Greener On The Other Side," except to reiterate the bottom line which was "[w]e are not saying that such language would be contained in such a labor agreement, and such matters are subject to negotiations." (Tr. 1060; R. Exh. 93.) I am not convinced that Ortiz kept to the script. Her testimony was not corroborated by Potter. Where, as here, a party fails to elicit testimony from a witness whose testimony would be reasonably assumed to favor that party, an adverse inference can be drawn that had the witness been questioned about the matter the testimony would have been unfavorable to the party's cause. *International Automated Machines,* 285 NLRB 1122, 1123 (1987). An adverse inference is warranted here. Thus, I find that contrary to Ortiz's testimony she did not adhere solely to the document. (R. Exh. 93.)

The evidence shows, however, that Penley credibly testified that Ortiz told him that he possibly could lose at least $2.00 an hour or more if the Union was selected.

14. April 1, 2002

A few days before the election, long-time employee, Henry Baker, was working near the plant furnace, when he was approached by Supervisor Preston Estep. (Tr. 350.) Baker testified that Estep had some anti-union literature with him that described a UAW plant closing in Waverton, Ill. Although Baker expressed no interest in the literature, Estep read the literature to him out loud. When he finished, Estep left the literature with Baker, which had been outlined by

Estep in yellow. (Tr. 350-351.)

Estep admitted that a few days before the election he read a handout about plant closings to Baker during working time in a work area. (Tr. 762 - 763.) He also admitted that Baker did not ask him to read the literature to him. Estep testified that it was his understanding that Baker could not read, so he read the flyer to him. Contrary to Estep's assertions, Baker unequivocally testified that he could read, but that he had trouble with spelling. (Tr. 353.)

Also on April 1, Employee Bud Tebo testified that he spoke to Supervisor Burns in her office about leaving work early because of a doctor's appointment. Tebo stated that in the course of that discussion, Burns suddenly asked him what she could do to secure his vote against the Union. (Tr. 28-29.) Tebo testified that he told her there was nothing that she could do, that he would gather information, and make his own conclusion. Burns denied ever asking Tebo what she could do to secure his vote against the Union. (Tr. 951.) For demeanor reasons, I credit Burns' denial.

15. Early April 2002

Sometime in early April 2002, prior to the election on April 5, the Company held a number of mandatory pro-Company meetings at which Corporate Human Resources Manager, Les Irbin, addressed the employees. Employee Tebo testified that he attended such a meeting during the first shift on April 1. (Tr. 27.) Tebo stated that there was an anti-union discussion, followed by a video, and a question and answer period. He testified that he asked to two questions. To Irbin, he asked what would be corporate's reaction if there was a Union ratified at Intermet-Stevensville? Tebo testified that "[h]is answer was that we said no Union." (Tr. 27.) He then asked Joe Barry if the Company could guarantee his job, since the Company had made it a point that the Union could not guarantee jobs, to which Barry gave a "team talk" about getting more jobs.

Employee Kristie Cramatie testified that she attended a similar meeting on third shift. (Tr. 58.) She testified that when employee Marcy Klug asked Irbin how many Intermet plants were organized, he responded that there were not many and that Intermet-Stevensville was not going to be one of them. (Tr. 81.)

Employee Shembarger testified that on April 3, the night before the union election, he went to a third shift meeting called by the Company that was attended by Irbin, Joe Barry, and Valerie Ortiz. (Tr. 406, 419.) Shembarger stated that during the question and answer session, employee Marcy Klug asked Irbin how many Intermet plants were unionized. Shembarger testified, "I'm not sure if he gave a number or an answer, on how many which way or another but then, he made a comment that this plant was not going to be union." (Tr. 407.)

Corporate Human Resources Director Les Irbin testified that he attended several employee meetings sometime in March 2002. (Tr. 878.) He stated that he spoke mostly from a prepared text and that he answered questions afterwards. (Tr. 874; C. P. Exh. 10; Tr. 876.) Specifically, Irbin testified, "I think somebody asked me a question about how many of the plants were organized, and I told them about half of them or something like that." (Tr. 876, 881.) Irbin stated that he did not remember "a whole lot of questions" but he thought that someone asked him what kind of relationship he had with the unions, and he thought he responded good in most cases. When asked if he ever told the employees that there would be no union at Intermet-Stevensville, Irbin responded, "absolutely not." (Tr. 876.)

Irbin's testimony was very guarded. On cross-examination, he became defensive when Counsel for the General Counsel inquired about the questions asked by employees, stating "I think I've already answered that question … Do you want me to answer it again?" (Tr. 880.) After being prompted to identify the questions asked by employees at the meeting, he testified "[t]he only thing I can remember is they asked me if we had other union facilities, how many, and I said about half. Then they asked me about the relationships. That's the only thing I can remember that was asked. There were very few questions." (Tr. 881.)

Irbin's inability to recall earlier events in the organizing campaign was equally dubious. General Manager Joe Barry testified that early in the campaign he had a three-way phone conference with his boss, Todd Haven; a corporate attorney, Alan Miller; and Les Irbin of corporate human resources seeking guidance with respect to the wearing of union buttons. (Tr. 1136-1137.) Irbin could not remember such a call, even though this was the one and only organizing drive that he dealt within the previous year. (Tr. 883-884.) He testified that he is the only human resources person in corporate and that if Barry had placed such a call, it would have been to him. (Tr. 884.) The only thing that Irbin was absolutely sure of, was that he "absolutely [did] not" tell the employees at any of the meeting that there would be no union at Intermet Stevensville. (Tr. 876.)

Other parts of Irbin testimony were similarly unconvincing. He testified that one of his job duties is to help "non-union plants in union avoidance activities," but he denied that he went to Stevensville "to let the employees know Corporate's position with respect to unionization of the Stevensville facility." (Tr. 878.) Instead, he unpersuasively testified that he "was there to share some of the experiences that we had with other union campaigns and some of the other things we had had with other unions at other plants … [t]o give them facts so they could make their own responsible decision." (Tr. 878.) His assertions are inconsistent with the text of the speech he "pretty much read verbatim." (Tr. 882.) It begins with the unequivocal declaration that the Respondent did not want a union at Intermet-Stevensville: "I also am responsible for assisting our union-free plants to remain union-free. I can tell you in no uncertain terms that the company does not want a union here – just like they did not want one in Havana, Illinois and at Columbus Machining." (C.P. Exh. 10, page 14.) Notwithstanding that statement, Irbin testified at trial that the Respondent did not have a policy with regard to unions and that as corporate human resources director, he had not been given any direction by his superiors on whether to fight a union organizing drive or remain neutral. (Tr. 886.) His testimony is unpersuasive.

For these, and demeanor reasons, I find that Irbin's testimony that he did not tell the employees that there would be no union at Intermet-Stevensville is incredulous. It also conflicts with the credible testimony, which I credit, of three employee witnesses who testified that they heard Irbin state that there would be no union at Intermet-Stevensville.

F. *The Post Election Conduct*

On April 5, 2002, an election was conducted. The Intermet-Stevensville employees voted 37 to 38 against union representation. There were no void and no challenged ballots.

1. April 5, 2002

By employment application, dated April 5, 2002, Daniel Baldwin – the brother-in-law of Employee Bud Tebo – applied for employment at the Company. Baldwin testified that while filling out the application, the receptionist, who he described as an older women with gray hair, gave him a separate sheet of paper that contained one question: Have you ever been a member of a "guild?"

Baldwin's testimony is dubious for several reasons. First, his testimony about when he applied for a job with the Company is uncorroborated by any evidence and contradicted by the documentary evidence. Baldwin testified that he actually applied twice for a job at Intermet-Stevensville: once in late December 2001 and again in February 2002.[36] However, his one and only employment application is dated, April 5, 2002. Second, former Intermet receptionist, Bonnie Nitz, who has red hair, credibly testified that she was the receptionist at the Company for the two years prior to the organizing drive, that she alone pre-prepared all the applications that are given out, and that none of applications contained a separate sheet of paper inquiring whether the applicant had ever belonged to a guild. (Tr. 734-735.) Thus, her credible testimony contradicts Baldwin's assertion that he was given the survey in February 2002. Her testimony, coupled with the fact that no such survey sheet was produced at trial, also makes it more likely than not, that the survey never existed.

In addition, Baldwin conceded that he had completed applications "all over the place" and had "seen a lot of receptionists, a lot of secretaries," and had been handed a lot of applications. This raises the possibility that he may have confused another employer with the Respondent. Indeed, Baldwin conceded that he could be confusing the Intermet receptionist with someone else. (Tr. 380, 748.)

Lastly, the fact that Baldwin is the brother-in-law of Union supporter Tebo, who was disciplined by the Respondent, raises some questions about his ability to objectively and truthfully testify. According to Baldwin, he never gave the "separate piece a paper" a second thought until one afternoon, when he and brother-in-law Tebo were having a beer, he mentioned it to him. (Tr. 749.) Baldwin testified that it was Tebo that pointed out to him that something was amiss and encouraged him to come forward with his story. Inexplicably, Tebo, who was a witness for the General Counsel, was not asked about and, therefore, did not corroborate Baldwin's story about how the "separate piece of paper" incident came to light. The failure of Tebo to corroborate Baldwin's testimony warrants an adverse inference that his testimony would not have been supportive. *International Automated Machines,* 285 NLRB 1122, 1123 (1987).

For these, and demeanor reasons, I do not credit Baldwin's testimony that at the time he applied for employment at the Company he was presented with a separate piece of paper that contained a question inquiring whether he had ever belonged to a guild.[37]

2. May 20, 2002

On May 20, Supervisor Burns, Operations Manager Ortiz and human resources staff Bonnie Nitz met with Employee Lisa Cogswell in the human resources office, where they presented a written 60-day follow-up review to the formal warning that Cogswell received on March 18. (Tr. 981-982; G.C. Exh. 23.) Burns read the two-page written review to Cogswell telling her that she was being demoted and transferred out of stock room to the finishing department because her performance has not improved and her interaction with customers and vendors was unacceptable.

[36] Baldwin testified that he was presented with the separate piece of paper the second time he applied. (Tr.747.)

[37] In the absence of any credible evidence to support an alleged violation, I shall recommend that paragraph 20 of the amended complaint be dismissed.

3. June 19, 2002

On June 19, Union member Craig Reynolds applied for a job at Intermet-Stevensville. (Tr. 562.) The next day, he interviewed with Operations Manager Valerie Ortiz and Supervisor Rick Burkhold. Reynolds testified that in the course of the interview Ortiz brought up the subject of unions twice. (Tr. 565.) The first time "she had said to me, I would like you to know that we are a non-union work force and asked me how do I feel about that." (Tr. 565-566.) A little later, she stated, "I just want all of our new employees to be aware, once again, that we are a non-union work force and we are planning on remaining a non-union work force." (Tr. 566.)

At trial, Ortiz was called as a F.R.E. 611 (c) witness by the General Counsel. She testified that as part of her job, she sometimes interviews job applicants and that since February 2002, she had interviewed two people. (Tr. 545-546.) Ortiz admitted that in the course of interviewing potential applicants, she tells them that the Company was Cast-Matic, it is now Intermet Stevensville, and "we are a non-union work force and that is all." (Tr. 547.) She denied ever telling a job applicant that Intermet will remain a non-union work force or asking them how they feel about unions. She added that if the job applicant brings up the subject of unions, she stops the conversation. (Tr. 548.) Prior to trial, Ortiz also submitted a sworn affidavit stating that she never asked any of the job applicants about their union sentiments. (Tr. 549-550.)

Unbeknownst to Ortiz, Reynolds had secretly taped recorded his job interview with Ortiz and Burkhold. A transcript of the tape, as well as the actual tape itself, was moved into evidence (G.C. Exh. 46 and 47.)

The following relevant portion of the transcript/tape undisputedly corroborates Reynolds' testimony:

15:4 Ortiz:
"Um…I guess one of the things we probably should have started with is we are a nonunion work force, our plan is we will remain a nonunion work force, so I don't know how your feelings are and what kind of (inaudible)"
15:5 Reynolds:
"I worked for, one time when I worked for MJ Ferguson, I had to be… (cough) I had to get in the building trades union as a laborer to work for them, that's how it worked for them, till the job was over, with generators and the…at the Cook plant, we were mainly laborers..or the grunts."
15:9 Ortiz:
"Yeah"
Reynolds
"you know, but, the employer (inaudible) to be in the union to work there for their contracts"
16:0 Ortiz:
"it's just, you know for the most part it's (inaudible) 50/50 but we wanna just make sure for any new employees are… we are nonunion…we've been nonunion, we are (inaudible)…I think enough about that uh, (inaudible). Ah, computer skills.."

(G.C. Exh. 47.)

When Ortiz was subsequently recalled as a witness for the Company, she emphatically asserted that she was an honest person. In an effort to rehabilitate her credibility, she attempted to fill in the inaudible portions of the transcript/tape. (Tr. 1088-1089.) She was not persuasive. In addition, the Respondent did not call Rick Burkhold as a witness to corroborate any part of Ortiz' testimony concerning the interview. Where a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be

drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines,* 285 NLRB 1122, 1123 (1987).

On the other hand, Reynolds was a very credible witness. His testimony is corroborated by the transcript/tape. I credit Reynolds' testimony concerning what Ortiz asked him at the interview.

III. Analysis and Findings

A. *Alleged Section 8(a)(1) Violations*

1. The alleged unlawful confidentiality policy

Paragraphs 7(a)(i), 33 and 34 of the amended complaint allege that the Respondent's confidentiality policy that appeared in the employee handbook up until March 2002,[38] unlawfully interfered with and restrained employees' Section 7 rights and that the maintenance of the rule is so serious and substantial that it is not possible to erase its effects and conduct a fair rerun election.[39] The relevant policy states:

> All INTERMET Stevensville Plant records and information relating to INTERMET Stevensville Plant or its customers or suppliers are confidential and employees must, therefore, treat all matters accordingly. No INTERMET Stevensville Plant or INTERMET Stevensville Plant-related information, including without limitation, documents, notes, files, records, oral information, computer files, or similar materials (except in the ordinary course of performing duties on behalf of INTERMET Stevensville Plant) may be removed from INTERMET Stevensville Plant premises without permission from INTERMET Stevensville Plant. Additionally, the contents of INTERMET Stevensville Plant's records or information otherwise obtained in regard to business may not be disclosed to anyone, except where required for a business purpose. Employees must not disclose any confidential information, purposefully or inadvertently (through casual conversation), to any unauthorized person inside or outside the Company.
>
> Employees who are unsure about the confidential nature of specific information must ask their supervisor for clarification. Employees will be subject to appropriate disciplinary action, up to and including termination for the first or repeated offenses, for knowingly or unknowingly revealing information of a confidential nature.

In *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), the Board stated:

> In determining whether the mere maintenance of rules …

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[38] The evidence shows that all employees receive a copy of the employee handbook.

[39] Although there is no evidence, nor is it argued, that the Respondent has enforced or applied the confidentiality rule, the Board has held that it is the maintenance of the rule, and not its enforcement or its effect on the employees, that is of significance. *Freund Baking Co.,* 336 NLRB No. 75, slip op. at 1, fn.4 (2001).

> violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. See *NLRB v. Vanguard Tours,* 981 F.2d 62, 67 (2d Cir. 1992), citing *Republic Aviation [v. NLRB],* 324 U.S. [793], at 803 fn. 10.

The Board has applied this standard in subsequent cases, to wit: *Iris U.S.A.,* 336 NLRB No. 98 (2001) (confidentiality rule, specifying that information about employees, including each employee's personnel records are considered confidential, unlawful); *Super K-Mart,* 330 NLRB 263 (1999) (confidentiality rule, specifying that company business and documents are confidential, lawful – since rule did not mention employee information); *Flamingo Hilton-Laughlin,* 330 NLRB 287 (1999) (employer code of conduct, prohibiting employees from revealing confidential information regarding customers, fellow employees, or hotel business, unlawful).

The confidentiality rule, here, does not mention employee information or specify that personnel records are considered confidential information. The rule does not literally bar employees from discussing wages or working conditions. Rather, the rule, here, is more like the rule in *Lafayette Park Hotel,* in that it is designed to prohibit the disclosure of information pertaining to the Company's business, its customers, and its suppliers. I find that the language of the rule could not be reasonably construed as prohibiting employees from discussing terms and conditions of employment with other employees or the Union. I further find that the maintenance of the confidentiality provision in the Respondent's employee handbook did not violate Section 8(a)(1) of the Act. Accordingly, I shall recommend that the allegations in paragraphs 33 and 34 of the amended complaint as they pertain to paragraph 7(a)(i) be dismissed.

2. The unlawful no-solicitation rule

Paragraphs 7(a)(ii), 33 and 34 of the amended complaint allege that the Respondent's standard shop rule no. 13, which appeared in the employee handbook up until March 2002, unlawfully interfered with and restrained employees' Section 7 rights and that the maintenance of the rule is so serious and substantial that it is not possible to erase its effects and conduct a fair rerun election. Standard shop rule no. 13 states that the following conduct is prohibited and may result in discipline:

> Soliciting in any form during working hours. Soliciting from working employees during the employee's own non-working hours.

The General Counsel argues that the rule on its face is presumptively invalid and that the Respondent has presented no evidence to show that it communicated to the employees that the non-solicitation rule did not apply during break periods. *Our Way, Inc.,* 238 NLRB 209, 214 (1978). The Respondent, in its posthearing brief at pages 10-15, does not dispute that the shop rule is presumptively invalid. It also does not argue, nor does the evidence show, that it communicated to the employees that the non-solicitation rule does not apply during break periods and lunches. Rather, the Respondent argues that the rule was never enforced and that the evidence shows the employees distributed union materials during working hours in working areas. That argument fails for two reasons.

First, as noted above, it is settled law that lack of enforcement is not a factor. The mere maintenance of a rule, which would reasonably tend to chill employees in the exercise of Section 7 rights is what is significant. In addition, the evidence does not show that the Respondent at any time prior to March 2002 told the employees that they were permitted to solicit during break and lunches and other non-working times. The numerous examples of employees noncompliance with the rule cited by the Respondent show that enforcement was lax – not that solicitation was expressly permitted during non-working times or that the employees were notified of such an exception by the Respondent.

Finally, the Respondent argues that even if shop rule no. 13 violated the Act, the Respondent repudiated its unlawful conduct by posting on March 6 and 28 revisions to shop rule no. 13, as well the other disputed policies (i.e., confidentiality policy and resolution opportunity program, *infra.)*. It argues, therefore, that under *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978), the allegation should be dismissed. I disagree.

In *Passavant*, the Board stated that an employer may relieve itself of liability for unlawful conduct by repudiating such conduct, if "such repudiation [is] 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct,' and 'free from other proscribed illegal conduct.' *Douglas Division, The Scott & Fetzer Company,* 228 NLRB 1016 (1977), and cases cited therein at 1024." 237 NLRB at 138. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication." 237 NLRB at 138. The Board also pointed out that the repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights.

The Respondent's March 6 posting regarding its solicitation policy does not satisfy the *Passavant* criteria.[40] (G.C. Exh. 3C.) To begin with, it does not disavowal that shop rule no. 13 is presumptively invalid or unlawful. Rather, it tells the employees "in order to make clear the Company's position regarding solicitations and distributions, we ask that you disregard the aforementioned references in your employee handbook and observe the following to be the Company's position regarding solicitations and distributions:

> "Distribution of literature to employees during working time and in working areas is prohibited.
>
> Solicitation of employee's during working time is prohibited."

The Respondent did not admit any wrongdoing, it simply informed the employees that it was clarifying its policy. Indeed, in its posthearing brief, the Respondent still did not admit that the

[40] Similarly, the March 28 postings which announced a revised confidentiality statement, revised confidentiality work rule, and revised resolution opportunity program were ineffective. (G.C. Exh. 3D and E.) They are not timely inasmuch as the policies, which had been in existence for quite some time, were not revised until over a month after the Union organizing campaign began. Significantly, the postings did not acknowledge that the existing policies were unlawful or in any manner explain the reason for the revision. Further, the Respondent has not shown that the revisions remained posted for more than a week or so, which would have ensured that all employees were adequately notified of the revisions. Finally, as further discussed below, the Respondent committed other unfair labor practices before, simultaneously, and subsequent to the posting.

non-solicitation policy was unlawful.

In addition, the posting was not timely. The shop rule has appeared in the employee handbook for quite some time. The clarification did not come until almost three weeks after the start of the Union organizing campaign. The evidence shows that simultaneous and subsequent to the posting, the Respondent committed other unfair labor practices, which interfered with the employees Section 7 rights. Finally, and most significantly, neither this posting nor the postings concerning the other disputed policies, assured the employees that in the future the Respondent would not interfere with the exercise of their Section 7 rights. Thus, the evidence does not show that the Respondent repudiated any unlawful conduct.

Accordingly, I find that the promulgation and maintenance of shop rule no. 13 in the employee handbook up until March 2002 violated Section 8(a)(1) of the Act as alleged in paragraphs 7(a)(ii) and 34 of the amended complaint.

3. The unlawful resolution opportunity program

Paragraphs 7(b), 33 and 34 of the amended complaint allege that the Respondent maintained a "resolution opportunity program," which appeared in its employee handbook until March 2002, that unlawfully interfered with and restrained employees' Section 7 rights and that the maintenance of the rule is so serious and substantial that it is not possible to erase its effects and conduct a fair rerun election. In pertinent part, the policy states:

> A. Intention of the Program
>
> 1. The Resolution Opportunity Program is used to resolve concerns dealing with workplace conditions, conditions of employment, treatment of the employee by management, supervisors, or other employees, or the application of Company policies, practices, rules, regulations, and procedures to the employee's individual situation.
>
> (…)
>
> B. Representation
>
> Each employee using the Resolution Opportunity Program must represent his or her self in the process – no employee may represent appeal, or speak on behalf of another employee during the process except as a witness as needed by the investigating manager. There is no retaliation or reprisal for an employee who uses the Resolution Opportunity Program.

(G.C. Exh. 3, Addendum 6.)

The written policy on its face unlawfully prohibits employees from acting in concert in dealing with management about matters affecting their terms and conditions of employment and from acting together for their mutual aid or protection. *Kinder-care Learning Centers,* 299 NLRB 1171, 1172 (1990). In its posthearing brief at pages 10-15, the Respondent does not specifically address or defend the Resolution Opportunity Program policy. Rather, it asserts that by revising the policy in March 2002 (see G.C. Exh. 3E), it effectively repudiated any unlawful conduct and therefore no violation should be found. I disagree. The revision, which was posted on March 28

– less than one week before the election, was not timely. More importantly, it did not disavowal the policy as presumptively invalid nor did the Respondent acknowledge that it acted unlawfully by maintaining the policy. Finally, the Respondent did not assure the employees that it would not interfere in the future with their Section 7 rights. To the contrary, as shown below, the Respondent engaged in other unlawful conduct before, simultaneous with, and after the revision.

For these reasons, I find that the Respondent's Resolution Opportunity Program policy prior to March 28, 2002 violated Section 8(a)(1) of the Act as alleged in paragraphs 7(b) and 34 of the amended complaint.

4. The alleged threat of job loss and customer orders

Paragraph 9(a) of the amended complaint alleges that on February 11, 2002, Project Materials Manager Zoe Burns told Employee Bud Tebo that if the Union was selected it could result in the loss of business and future orders. According to Tebo, Burns told him that the Company "could possibly lose business and future orders." (Tr. 21-22.) Burns denied making such a statement and for the reasons stated above, I credit her denial. Accordingly, I shall recommend the dismissal of the allegations of paragraph 9(a) of the amended complaint.

5. The unlawful removal of employee bulletin boards

Paragraph 8 of the amended complaint alleges that on February 15, 2002, the Respondent unlawfully removed the bulletin boards in the employee break room, including the bulletin board reserved for employee communications. The evidence shows that on February 14, General Manager Joe Barry found out about the Union organizing drive. He testified that management had heard rumors on the shop floor about the Union and he suspected that an organizing drive was imminent. (Tr. 533-534.) Barry further testified that on the same day – or perhaps the day before – he ordered that all the bulletin boards be taken down in the break room so that the walls could be painted in preparation for an upcoming QS 9000 audit. (Tr. 505.)

The evidence shows, however, that the walls were not painted. Instead, they were washed sometime between February 28 and March 1. The bulletin boards were rehung three days later on March 4.

The timing of the removal supports a reasonable inference that Barry ordered the removal of the bulletin boards in order to thwart the Union's organizing efforts. There is no evidence that Barry ever contemplated cleaning up the break room until he learned that the Union organizing drive was imminent.[41] Manufacturing Engineer Bill Atkins testified that no one told him ahead of time that the room was going to be painted and he is the person who normally gets the supplies for that type of job. (Tr. 922-923.) He added that he did not become aware that the break room was going to be painted until after some of the boards had been removed at which time he was told by Facilities Manager Dave Patterson, "you're going to paint." [42] (Tr. 923.) It all happened so fast, that Atkins immediately advised Patterson that there was not enough time to paint the walls, allow them to dry, and rehang the boards. Atkins therefore prevailed upon Barry to wash the walls instead.

[41] Barry was not a labor relations neophyte. The evidence shows that he had experienced an organizing drive while employed at Contech.

[42] Patterson testified that although Barry instructed him to paint the walls, he did not tell him why. (Tr. 802.)

Although the bulletin boards were removed immediately, the evidence shows that the actual cleaning, which was completed in a day or two, did not take place until almost two weeks after the bulletin boards were removed. The Respondent has not explained the two-week delay. To the contrary, in its posthearing brief, the Respondent does not defend the removal of the bulletin boards or even address the allegations raised in paragraph 8 of the amended complaint.

Thus, the evidence viewed as a whole reflects that at a time when the Union organizing drive was starting to build momentum, the bulletin boards in the employee break room used by the employees to convey information were rendered unavailable. The evidence further reflects that Barry's decision, which effectively coincided with his discovery that a Union organizing drive was imminent, was not preplanned, but was precipitous. I therefore find that the removal of the bulletin boards tended to interfere with the Section 7 rights of the employees in violation of Section 8(a)(1) of the Act. *Beverly Enterprises,* 310 NLRB 222, 276 (1990).

6. The unlawful conduct on February 18 and 20

Paragraphs 10, 11, and 13 of the amended complaint allege several violations in connection with Kristie Cramatie's February 18 and 20 meeting with Operations Manager Valerie Ortiz and Supervisor Brandon Reed.

a. *The unlawful request to remove Union buttons*

Paragraph 10(b) alleges that on February 18, Operations Manager Valerie Ortiz unlawfully asked Employee Kristie Cramatie to remove her Union button and told her not to wear it again.

It is settled law that the display of items, such as union buttons, is protected by Section 7 of the Act, unless the employer can show that special circumstances existed at its facility that outweighed the employees' statutory rights. *Escanaba Paper Co.,* 314 NLRB 732, 733 (1994). The Respondent admits, and Ortiz did not deny, that on February 18 she told Cramatie to remove her Union button. (See Respondent's Answer to Amended Complain, para. 16; Tr. 1052.)

At trial, Ortiz sought to justify her conduct by testifying that the Respondent was a nonunion facility and that she was concerned that potential customers and visitors might be confused or upset if they saw employees wearing union buttons. The evidence shows that the Respondent had customer visits planned for the upcoming weeks. (Tr. 499, 1165.) However, the evidence does not show, nor does the Respondent argue in its posthearing brief, that special circumstances warranted a prohibition on the display of Union buttons.

The Respondent instead argues that the Act was not violated because the prohibition on wearing union buttons was repudiated by a March 6, memo to all employees clarifying the Respondent's policy regarding the wearing/displaying of "controversial" attire. (G.C. Exh. 3B.) The memo stated:

> In the past, we have discouraged employees from wearing/displaying buttons/badges/attire of a controversial nature in an effort not to interfere with customer relations.
>
> However, given our understanding from INTERMET Corporate Human Resources, employees are permitted to wear buttons/badges and

> other insignias in support of or opposition of a labor organization.
>
> As most of you know, recently, we have had sabotage, breaking into offices, as well as defacing Company property. Given such destructive occurrences, we will, as in the past, continue to enforce our policy regarding any Company property, machinery, and equipment defacing as defined in the INTERMET, Stevensville Plant, Employee Handbook under Standard Rules and Regulations.

Contrary to the Respondent's assertions, the March 6 memo is not a disavowal of unlawful conduct in accordance with *Passavant Memorial Hospital,* supra. To begin with, the so-called repudiation memo was not timely. According to General Manager Barry, he was informed by corporate human resources on February 20 that employees had the right to wear union buttons. (Tr. 1136-1137.) More than two weeks passed before the March 6 memo was posted. In addition, the memo does not inform the employees that it was unlawful to prohibit the wearing of union paraphernalia or that the Respondent would not interfere with their Section 7 rights in the future. Based on the evidence, viewed as a whole, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 10(b) of the amended complaint.

b. *The unlawful prohibition on bringing Union buttons and materials into the plant*

The credible evidence shows that in the same conversations on February 18, and on February 20, Ortiz told Cramatie that employees were not permitted to bring Union buttons and materials into the plant. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 10(c) and 11(c) of the amended complaint.

c. *The unlawful interrogation of Kristie Cramatie*

Paragraphs 10(e) and 11(a) of the amended complaint allege that on February 18 and 20, Operations Manager Valerie Ortiz unlawfully interrogated Employee Kristie Cramatie about her Union activities, and the Union activities of other employees. The credible evidence shows that at the February 20 meeting, in the course of being questioned again about passing out Union buttons, and about harassing co-workers to support the Union, Cramatie told Ortiz and Reed that she was being harassed by employees about the Union. Ortiz told Cramatie that if she gave her the names of the persons who were harassing her about the Union, she would arrange a meeting to address the issues. (Tr. 1053-1054.)

An interrogation is unlawful when the questioning, viewed from an employee's perspective, reasonably tends to restrain, coerce or interfere with the employee's exercise of protected statutory rights under the Act. *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985). The factors to be considered in analyzing the interrogation are: "(1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation." *Rossmore House,* 269 NLRB 1176, 1178, fn. 20.

The undisputed evidence shows that Ortiz, the second highest management official at the plant, called Cramatie, a newly hired employee, to her office where behind a closed door Cramatie was questioned by Ortiz and Supervisor Reed about passing out Union buttons and about harassing employees about the Union. Ortiz was acting on a complaint made by Employee Betty Scott that Cramatie had harassed her about the Union and had forced her to accept a Union button. Based on this information, Ortiz suspected that Cramatie was defying Ortiz' instructions of two days earlier about not bringing Union buttons and materials into the

plant. Because Ortiz sought to question Cramatie about her continued involvement in passing out Union buttons and her involvement in encouraging employees to support the Union, the overall purpose of the meeting was unlawful.

The unrebutted evidence also shows that in response to Ortiz's questions on February 20, Cramatie became very emotional, began crying, and expressed a fear that she was going to lose her job. The unrebutted evidence therefore shows that Cramatie was threatened by Ortiz' questioning.

In this context, Cramatie told Ortiz and Reed that she felt like she had been harassed by co-workers, who were coming to her part-time employment at Radio Shack to discuss the Union. At that point, Ortiz asked her for the names of the people who purportedly were harassing her, so she would arrange a meeting with them to resolve the matter. The Board has held that an employer violates the Act when it invites its employees to report instances of fellow employees bothering, pressuring, abusing, or harassing them with union solicitations and it implies that such conduct will be punished.[43] *Greenfield Die & Mfg. Corp.,* 327 NLRB 237, 238 (1998).

In view of all the circumstances, including where the conversation took place, the reason the meeting was called, who participated in the meeting, the questions that were asked, and the coercive nature of the inquiry itself, I find that the questioning reasonably tended to restrain, coerce, and interfere with Cramatie's exercise of Section 7 rights. Accordingly, I find that the Respondent violated paragraph 11(a) of the amended complaint.

However, because I have found, by crediting the testimonies of Ortiz and Reed, that the unlawful interrogation took place on February 20, and not on February 18, I shall recommend the dismissal of paragraph 10(e) of the amended complaint.

d. The alleged unlawful solicitation of grievances

Paragraph 10(f) of the amended complaint[44] further alleges that Ortiz unlawfully solicited a grievance by asking Cramatie to provide the name or names of the employees who had harassed her about the Union and by telling her that she could arrange meeting to reconcile the matter. I find that Ortiz' statement to Cramatie was not a solicitation of a grievance. Ortiz was not asking Cramatie to identify her concerns. Cramatie already had told Ortiz that she felt like she was being harassed by other employees about the Union. Rather, in the context in which the statement was made, the evidence supports a reasonable inference that Ortiz asked for the names of the other Union supporters in an attempt to find out who else was soliciting for the Union. Accordingly, I shall recommend the dismissal of paragraph 10(f) of the amended complaint.

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[43] Although Ortiz testified that she told Cramatie that she wanted the names of the other Union supporters in order to arrange a meeting with everyone to address the issue, her conduct belies her assertions. Ortiz did not arrange such a meeting or offer to arrange such a meeting between Cramatie and Betty Scott. Rather, she called Cramatie to her office again to admonish her about handing out Union buttons in the plant and soliciting support for the Union.

[44] Although the amended complaint alleges the violation occurred on February 18, the credible evidence shows, and I have found, that conversation in question actually took place on February 20, 2002.

e. The unlawful statement that it would be futile to organize

In addition, paragraph 10(a) of the amended complaint alleges that during the February 18 meeting, Ortiz unlawfully implied that it was futile to organize a Union. Cramatie credibly testified that Ortiz told her that the Company was nonunion and that it intended to stay that way. Ortiz did not deny making that statement. Rather, the Respondent argues that under Section 8(c) of the Act, employers may lawfully state their opposition to a union and their preference to remain nonunion citing *Ross Stones, Inc.,* 329 NLRB 573 (1999). While that may be true, those statements are unlawful when coupled with other statements which violate the Act. See, *Hickory Creek Nursing Home,* 295 NLRB 1144, 1148 (1989), affd sub nom. *NLRB v. Health Care Management Corp.,* 917 F.2d 1304 (6th Cir. 1990).

In the present case, the evidence shows that Ortiz told Cramatie that the Company was nonunion and that it intended to stay that way in the same conversation in which she unlawfully told her to remove her Union button and to refrain from bringing Union materials into the plant.[45] The evidence further shows that two days later Ortiz unlawfully admonished Cramatie again about wearing Union buttons in the plant and unlawfully interrogated her about whether anyone had harassed her about the Union. Considering the totality of the circumstances, I find that Ortiz's statement that the Respondent was nonunion and intended to stay nonunion unlawfully implied to Cramatie that selecting a Union would be futile. Accordingly, I find that the Respondent violated the Act as alleged in paragraph 10(a) of the amended complaint.

f. The alleged implicit threat of discharge

Paragraph 11 (d) alleges that at the February 20 meeting, Ortiz implicitly threatened that Cramatie could be discharged for supporting the Union. The evidence shows that when Ortiz warned Cramatie again about distributing Union buttons in the plant, she became very emotional, began to cry, and told Ortiz and Reed that she did not want to lose her job. Ortiz credibly testified that in an attempt to reassure Cramatie that her job was not in jeopardy, she pointed out to Cramatie that if the Respondent wanted to fire her, they could have done so for being absent for 2 ½ days during her probationary period, which did not occur because she was a good worker. (Tr. 53, 1054.) Reed corroborated Ortiz' account of the sequence of what was stated to whom and when. None of which was disputed by Cramatie.

The evidence viewed as whole shows that Ortiz did not expressly or implicitly threaten Cramatie with job loss because of her Union activity. Accordingly, I shall recommend the dismissal of paragraph 11(d) of the amended complaint.

g. *The alleged unlawful surveillance*

Paragraph 11(b) alleges that during the February 20 conversation, Ortiz unlawfully created the impression of surveillance based on Cramatie's testimony that "another employee had told them that I had given them buttons, and there was a number of employees that said I had passed out buttons in the shop." (Tr. 52.) The test for determining whether an employer has created an impression of surveillance is:

> …whether the employee would reasonably assume from the

[45] The evidence also shows that during the same conversation Supervisor Brandon Reed unlawfully threatened that if the Union was selected, the Company could lose customers, which could result in the loss of jobs.

> statement that their [sic] union activities had been placed under surveillance …. The idea behind finding "an impression of surveillance" as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking notes of who is involved in union activities, and in what particular ways. *Flexsteel Industries,* 311 NLRB 257 (1993).

Fred K. Wallace & Son, 331 NLRB 914 (2000).

Ortiz' statement does not imply that management observed Cramatie or anyone else engage in Union activities. Nor does it imply that management was keeping track of her Union activities and therefore knew that Cramatie was passing out Union buttons. Rather, Ortiz's statement was based on what the employees had reported to her. The unrebutted evidence shows that at least one employee, Betty Scott, did complain to Ortiz about Cramatie pressuring her to take a Union button. There is no evidence that management asked Scott or any other employee to watch and report such activity. Thus, I find that Cramatie could not have reasonably believed that management had engaged in surveillance based on Ortiz' statement. Accordingly, I shall recommend the dismissal of paragraph 11(b) of the amended complaint.

h. *The unlawful threat of job loss*

Paragraph 13(a) of the amended complaint alleges, and the credible testimony shows, that at the February 18 meeting, Supervisor Brandon Reed implicitly threatened that if the Union was selected it could result in the loss of jobs. The issue here is whether Reed's statement is an unlawful threat in violation of Section 8(a)(1) of the Act or employer protected speech under Section 8(c) of the Act?

In *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 66-620 (1969), the Supreme Court articulated standards for evaluating the lawfulness of employer statements. The Court stated "[a]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' " *Id.* at 618, 89 S. Ct. at 1942. The Court further stated that an employer "may even make a prediction as to the precise effects he believes unionization will have on his company." *Id.* However, the prediction must be:

> carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion …. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside of his control," and not "threats of economic reprisal taken solely on his own volition." (citations omitted.)

The evaluation must be made in the context of the labor relations setting taking into account the

totality of the relevant circumstances.

The evidence shows that Reed's statement to Cramatie was not made in isolation, but in the course of a discussion during which Cramatie was told to remove her Union button, not to bring Union materials into the plant, and that it would be futile to attempt to organize a union. Thus, the general context in which his statement was made was coercive and threatening.

In addition, there is no evidence that Reed's statement is objective in nature or truthful. In this connection, the Respondent argues that in *NLRB v. Pentre Electric, Inc.,* 998 F.2d 363 (6th Cir. 1993), the Sixth Circuit Court of Appeals stated that the Board bears the burden of demonstrating that an employer's statement is unlawful, either because it is not objective in nature or because it is untruthful. *Id.* at 371. It further argues that the Board itself has noted that an employer's prediction of adverse economic consequences are to be deemed presumptively truthful. *Benjamin Coal Co.,* 294 NLRB 572 (1989). A careful reading and analysis of those cases, however, discloses that while an employer need not provide extrinsic evidence of objectivity, there must be some evidence in the record to support an initial presumption of truthfulness or to show that the employer's statement is facially objective.

For example, in *Pentre,* a management official, named Luff, explained to a group of employees that Pentre's customers did not use union contractors and therefore the company would not have the same customer base if it went union. Another management official, named Meehan, also discussed with a group of employees the customer base and described the difficulty of establishing a new customer base. These "objective facts" were unchallenged by the General Counsel.[46] In *Benjamin Coal Co.,* the evidence showed that the consequences of unionization "were articulated in a context of what the [e]mployer could not afford, why not, and why the [u]nion was likely to make such demands … Even prior to the advent of the [u]nion, the endangered status of Respondent's operation was a communicated fact, which should have been embedded firmly in the minds of all employees. The downslide in demand for coal and the resulting decline in revenues, the [c]ompany's deteriorating position with creditors, and the accumulated indebtedness – all burdened additionally by outlays necessary to satisfy reclamation responsibilities under state law – were matters of common knowledge and stood as verifiable fact prior to the advent of the [union]." 294 NLRB at 582.

In the present case, Reed's statement was not made to a group of employees. Rather, it was made to one recently hired employee, who was accompanied by a supervisor from her workstation to the office of the second highest management official of the Company. There, behind closed door, she was warned about taking breaks in the lab, even though the employees had routinely taken their breaks in the lab without repercussion, and then, in the context of being told to remove her Union button, she was told that if there was a Union, the Respondent could lose business which could result in the loss of jobs. Reed did not explain the basis for his remarks. He did tell Cramatie that the Respondent's customers hired only non-union facilities. Nor is there any evidence that would support his assertion. To the contrary, in a speech subsequently given by General Manager Joe Barry to a group of employees, Barry stated, "I want to make it clear that I am not saying that we will lose present customers or prospective customers if the UAW wins. I don't know what they would do." (C.P. Exh. 8, page 4.)[47] If anything, Barry's statement undercuts any argument that Reed's statement was

[46] The appellate court also noted that although Luff and Meehan expressed concern about the ability to establish a new customer base if the union was selected, nothing in their statements intimated that the company would close its doors if the employees voted for a union.

[47] Contrary to the Respondent's assertions, Barry's subsequent statement does not

Continued

presumptively truthful, based on "objective fact" or based on "common sense and experience."

Considering the totality of the circumstances, including the place where the statement was made, who made the statement, who was present, the context within which it was made, and the lack of objective basis for the statement, I find that Reed's statement was coercive and implicitly threatened a loss of jobs in violation of Section 8(a)(1) of the Act.

Paragraph 10(d) of the amended complaint alleges that on February 18, Valerie Ortiz also told Cramatie that "job loses could result from having a union, and that some customers don't like to deal with union shops." There is no evidence showing that Ortiz made such a statement. The General Counsel does not argue otherwise. Rather, it asserts that the Act was violated because Ortiz remained silent and did not contradict or correct Reed's unlawful statement, thereby ratifying and condoning his unlawful conduct. The General Counsel does not cite any cases in support of its position. In absence of any evidence or law in support of this allegation, I shall recommend the dismissal of paragraph 10(d) of the amended complaint.

i. *The unlawful restriction on taking breaks in the lab*

Paragraph 13 (a) alleges, and the unrebutted evidence shows, that at the February 18 meeting, Supervisor Brandon Reed told Cramatie that she was no longer permitted to take breaks or use the telephone in the lab. Reed testified that at the end of February 2002, he was prompted by several customer visits and an upcoming audit to meet with virtually all employees that reported directly or indirectly to him to discuss the uncleanliness of the lab. (Tr. 667.) He stated that in the February 18 meeting with Cramatie, Ortiz, Potter, and himself, he told Cramatie that taking breaks and eating in the lab were no longer permitted and that she was not allowed in the lab unless she had a business reason to be there. Potter testified that Cramatie was told to stay out of the lab because of vandalism and because people were not cleaning up after themselves. (Tr. 837.) He stated that prior to February 2002, the Respondent issued a memo telling employees that they were not allowed in the lab unless they were authorized to be there. He conceded, however, that employees continued to use the lab to take their breaks, instead of the break room, and that they were using the telephone in the lab for personal calls. (Tr. 837-838.) Potter stated that although he questioned employees taking breaks in the lab, who were not authorized to be there, he did not report or discipline them. (Tr. 853.)

The evidence shows that employees, like Cramatie, were taking breaks in the lab and "had been going in there for quite awhile," despite the Respondent's directive not to do so. (Tr. 838) It was only after the Union campaign began that the Respondent sought to tighten up on the use of the lab for taking breaks. The unrebutted evidence shows that it was in the lab that Cramatie solicited co-worker Betty Scott to support the Union. Soon thereafter she was called into Ortiz' office and was told to stay out of the lab and also to remove her Union button. Thus, the evidence as a whole supports a reasonable inference that the restricted use of the lab was prompted by advent of the Union. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 13(b) of the amended complaint.

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repudiate the unlawful conduct by Reed under the *Passavant* standard. It did not specifically acknowledge Reed's statement and repudiate it as unlawful. It was not free from other unlawful conduct that had occurred and continued to occur in the critical period as explained below. It did not contain the requisite assurances to employees regarding their future exercise of Section 7 rights.

j. *The unlawful prohibition on discussing the removal of union buttons*

Paragraph 11(e) of the amended complaint alleges that on February 20, Ortiz promulgated a rule prohibiting employees from discussing the Respondent's unlawful conduct and other terms and conditions of employment. The evidence discloses that in the course of the February 20 conversation, Cramatie told Ortiz that after leaving the February 18 meeting, she told co-worker Bill Tregoning that he had to remove his Union button.[48] At that point, Ortiz told Cramatie "that [she] should have left the conversation in her office, and [she] shouldn't have said anything to anybody on the floor." (Tr. 54.) According to Cramatie, Ortiz told her "to just leave all the discipline to management." (Tr. 56.) Ortiz did not deny making these statements.

It is unlawful to stifle communication between employees about a statutory protected right that has long been recognized, to wit: the right to wear union insignia at work. I find that by telling Cramatie that she should not have discussed with other employees the fact that she had been admonished for wearing a Union button in the plant, Ortiz violated Section 8(a)(1) of the Act.

7. The other unlawful conduct on February 20

Paragraph 14(a) of the amended complaint alleges, and the credible evidence shows, that on February 20 Supervisor Dale Potter told Employee Bill Tregoning to remove his Union button. The Respondent argues that Potter's conduct was pre-petition and therefore cannot be considered in evaluating whether the laboratory conditions for conducting an election have been destroyed. The argument is beside the point. Simply stated, it is an unfair labor practice to instruct an employee to remove a union button absent special circumstances which necessitate a prohibition on the wearing of such items. The evidence does not disclose that special circumstances exist in this case. To be sure, Potter did not articulate any special circumstances that required Tregoning to remove his Union button. Rather, the only reason he gave to Tregoning was that Barry and Ortiz would be upset if they came to work and saw him wearing a Union button.

The Respondent also argues that no violation occurred because the unlawful conduct was repudiated by the March 6 memo. For reasons already discussed, the argument is unpersuasive. The Respondent also argues that an inference of unlawful conduct is rebutted because the employees were told at employer information meetings held in early March that they were allowed to wear Union buttons. The premise of that argument is invalid. Here there is more than an "inference" of unlawful conduct. Rather, there is direct credible evidence that Potter unlawfully told Tregoning to remove his Union button, while implying that there would be unspecified reprisals by Barry and Ortiz if Tregoning did not comply.

I therefore find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 14(a) of the amended complaint.

The amended complaint also alleges,[49] and the credible evidence shows, that in the same February 20 conversation, Potter stated that if the Union was selected, health insurance premiums would increase and that employees were not allowed to bring any Union material into

[48] Tregoning testified that Cramatie told some other employees that she got in trouble for wearing a Union button, but he did not remember her talking specifically to him about it. (Tr. 101.)

[49] See, Paragraphs 14(b) and (c) of the amended complaint.

the plant. It is well settled that these types of statements tend to interfere with the Section 7 rights of employees. *E & L Transport Co.,* 331 NLRB 640 (2000). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 14(b) and (c) of the amended complaint.

8. The delayed performance review of Antonio Jeffries

Paragraph 9(d) alleges that on February 19, 2002, when Supervisor Zoe Burns gave Employee Antonio Jeffries his 90-day performance evaluation, she told him that it was delayed because of the Union. The evidence shows that Jeffries' performance evaluation was due in mid-December 2001, but that Burns did not give it to him until February 19, 2002. He testified that "[a]t that time, my review was late, and I asked her why my review was late. She told me that they simply hadn't had time because of the Union stuff." (Tr. 188.)

Burns did not deny making this statement to Jeffries. Instead, she testified that she was behind on her performance evaluations and that she told Jeffries in mid-January 2002, that she "was behind on reviews and that [she] would be getting them caught up as soon as [she] could." (Tr. 948.) Although she denied that the Union campaign had anything to do with delaying Jeffries 90-day review, she did not deny telling Jeffries that the delay was because of the Union.

I credit the unrebutted testimony of Antonio Jeffries that Burns told him at the time of his review that it was late because she "simply hadn't had time because of the Union stuff." Whether the Union was a factor in causing the delay and whether Burns told Jeffries in mid-January that she was behind on reviews is not important. The fact of the matter is that Burns' comment on February 19, 2002, tended to shift the onus to the Union, without explanation or clarification, by creating the impression that the delay was because of the Union campaign. *Atlantic Forest Products,* 282 NLRB 855, 859 (1987). Accordingly, I find that Burns' statement to Jeffries violated Section 8(a)(1) of the Act as alleged in paragraph 9(d) of the amended complaint.

9. The unlawful threats of February 22, 2003

Paragraphs 14(d) - (g) of the amended complaint allege, and the credible evidence shows, that on February 22, Supervisor Dale Potter in a conversation with Union advocate Bill Shembarger threatened that anyone who brought union materials into the plant would be suspended from work and escorted off the property by the police; that if the Union was selected, the plant would shut down; that General Manager Barry and Operations Manager Ortiz were not afraid to break the law and that they would do whatever they had to do to keep the Union out; and that the Respondent would not re-install the PCP machine if the Union was selected.

The Respondent nevertheless asserts that these allegations should be dismissed because "employers are not responsible for acts of minor supervisory employees especially when their activities are sporadic and do not reflect the attitude of the employer. *NLRB v. Clinton Woolen Mfg.,* 141 F.2d 753 (6th Cir. 1944). The argument is unpersuasive for several reasons. First, Potter is not a minor supervisory employee. He testified he effectively oversaw and supervised the entire third shift at the plant because he was the only manager on that shift. (Tr. 826.) Next, his interaction with employees who supported the Union was not sporadic. The evidence shows that he escorted Cramatie to Ortiz' office on February 18, and was present when Cramatie was told not to take breaks in the lab. He told Tregoning to remove his Union button and then reported him to Ortiz for being in the plant five minutes past the end of his shift. Potter also disposed of Union materials in the break room, as discussed below, and handed out pro-Company leaflets. Finally, the evidence shows that his conversation with Shembarger, as

well as all his other actions in opposition of the Union, are consistent with and reflect the antiunion attitude of the Respondent.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 14(d) through (g) of the amended complaint.

10. The unlawful impression of surveillance on February 26, 2002.

Paragraph 15(a) of the amended complaint alleges that on February 26, 2002, the Respondent unlawfully created the impression among employees that their Union activities were under surveillance. The unrebutted evidence shows that on February 26, 2002, Employee Tom Turney was in the tool room about five minutes past the end of his shift talking about the Union with two other employees, when Supervisor Jon Brant approached him. Turney credibly testified that after he told Brant that he was not on overtime, Brant stated to him, in the presence of the other two employees, "Well, you're not to be in this plant, because I've heard about you." (Tr. 239.) Brant did not deny making this statement to Turney. There is no evidence that he explained his comment to Turney.

Turney testified that he left the tool room, but a few minutes later he went to Brant's office to explain why he was there after his shift ended. When Turney told Brant that went to the tool room to drop off some last pieces, Brant told him that he could have completed that task before his shift ended. (Tr. 240-241.) He further testified that "I said Mike and them started talking to me and that's why I didn't have the part put up. And he said, 'What were you talking about.' And I said, 'None of your GD business.'" (Tr. 241.)

It is settle law that

> [T]he test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that their [sic] union activities has been place under surveillance…. The idea being finding "an impression of surveillance" as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking notes of who is involved in union activities, and in what particular ways. *Flexsteel Industries,* 311 NLRB 257 (1993).

Fred'K Wallace & Son, 331 NLRB 914 (2000).

The unrebutted evidence shows that Employee Tom Turney was an active and open Union supporter, who circulated the Union petition for signatures inside the plant. He credibly testified that after the Union campaign was initiated, he noticed that everywhere he went "there was a supervisor or Ms. Valerie Ortiz was keeping a pretty close eye on me." (Tr. 235-236.)

Turney's awareness that he was being closely watched was not simple paranoia. A "Do's and Don'ts" of how to respond to organizing activity which was prepared for the Respondent sometime prior to the instant organizing drive encouraged supervisors to watch for and report union activity. It states:

- Keep Joe and Alexa [50]informed of any union activities, rumor of Organization activities, or increased behaviors that tend to Indicate organizing activity, including

- Employees who aren't usually friendly spending a lot of time With each other.

- Increased use of the phones or other office equipment for Personal or unauthorized business

- Increased number of complaints

- Employees meeting with strangers in the parking lot or Elsewhere on company property during breaks

(C.P. Exh. 19.)

A few days earlier, Supervisor Dale Potter reported to Ortiz that he had seen Turney in the plant on February 13, 14, and 15, and told him that he had to leave. (G.C. Exh. 17, page 3.) Brant testified that Valerie Ortiz had previously told him that there had been complaints about Turney remaining in the tool room after his shift. He also testified that "she told me to watch the floor." (Tr. 867.) By asking Turney what he and the other were talking about, Brant signaled that he may have suspected that Turney was talking about the Union.

I find that the evidence viewed as a whole shows that Turney could reasonably infer from Brant's statement "Well, you're not to be in this plant, because I've heard about you," that his union activities had been place under surveillance. Accordingly, I find the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph15(a) of the amended complaint.

11. The unlawful restriction on taking breaks in the shipping department

Paragraph 16(a) of the amended complaint alleges, and the undisputed evidence shows, that on or about February 26, 2002, Supervisor Ricky Arthur told several first shift employees that they no longer were allowed to take their breaks in the shipping department area. The undisputed evidence further shows employees had been taking breaks in the shipping department area for quite some time and that Arthur did not give them any specific reasons for changing that practice.

At trial, Arthur basically gave two reasons for prohibiting the employees from taking their breaks in the shipping department area: vandalism and safety. (Tr. 712, 714.) With respect to the former, he testified that in "March, February or March" an employee brought to his attention that someone had tried to pry open the doorframe to his office, which led him to believe that someone had broken into his office. He further testified that he became more suspicious after he had difficulty logging on to his computer and found that a file had been removed from his office. (Tr. 713.) There is no evidence however that anyone actually broke into Arthur's office. Arthur did not testify, nor did he report, that he had any difficulty entering, unlocking or locking his office at anytime. The photographs of the office lock at best depict "scratches" around the face plate of the lock, which Arthur did not even notice until someone else pointed them out to

[50] The evidence discloses that "Alexa" was the human resources manager prior to Rick Swem. She left the Respondent sometime in 2001. (Tr. 1130.)

him.

In addition, Arthur's testimony about when he had difficulty logging on to his computer was contradictory. At first, he testified that the so-called computer tampering "actually occurred before somebody had broke into my office. That was around about – I think it was March, February or March." (Tr. 711.) A few minutes later, he testified that two days after he discovered that someone tried to force entry into his office, Ortiz took some photos of the door jamb. (R. Exh. 3; Tr. 713.) Contradicting himself, he stated that on that day, February 28, "was the date that I had the files that came up missing out of my office, and I believe that was also when we had some problems with the computer. I couldn't get logged …."[51] (Tr. 713.)

Finally, Arthur conceded that he left his office unlocked and open during the day shift. (Tr. 719.) That being the case, it is inconceivable that anyone would have to break into his office on the day shift. He also conceded that that other people had keys to access his office on the other shifts and that someone else could have accessed his computer from a computer terminal located at another location in the plant. (Tr. 719, 726.)

Thus, the evidence upon which relies the Respondent relies to support the assertion that its prohibition on taking breaks in the shipping department was based on vandalism is weak at best. In addition, Arthur did not give the same reasons to the employees for prohibiting them from taking their breaks in the shipping department. I therefore find, based on the evidence viewed as a whole, that the post hoc explanation of vandalism is exaggerated, if not created, to justify the prohibition.

The other reason given for the prohibition, i.e., safety, is equally dubious. Arthur testified that he was concerned that he might strike someone taking a break in the shipping department with a forklift. First, there is no evidence that safety was a concern prior to the start of the Union organizing drive, even though employees had been taking breaks in the area. Next, the evidence shows that everyone in the plant took their break at the same time. It strikes me as odd that a foreman would be working a forklift while the employees were on break. Finally, there is no evidence of incidents or near misses that would prompt such a concern after the organizing campaign began – and certainly none that came to mind when Arthur told the employee that they could no longer take breaks in the shipping area.

In light of all of the above, I find that the Respondent's reasons for restricting breaks in the shipping area are no more than unpersuasive post hoc rationalizations. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 16(a) of the amended complaint.

12. The unlawful prohibition on being in the plant after the shift ended

Paragraph 12(a) of the amended complaint alleges that on February 28, 2002, Operations Manager Valerie Ortiz unlawfully told Employee Tom Turney that he could not remain in the plant after his shift ended. Turney testified that after Supervisor Jon Brant confronted him in the tool room after his shift ended telling him that he had to leave the plant, Turney went to Ortiz' office to complain about being singled out and followed by supervisors. Turney credibly testified that Ortiz told him "that due to the vandalism and the Union campaign, that they were watching people to make sure where they were at and what they were doing, and

[51] Arthur testified that there was a second time that he had trouble logging in, but that was in June 2002. (Tr. 712.)

you were supposed to be out of the plant at the end of your shift." (Tr. 242.) Ortiz did not deny that she told Turney that the "union campaign" was one of the reasons for imposing the restriction. Rather, she testified that she wanted him out of the plant because it was a standing practice for employees to leave the building after their shift ended and because of the vandalism. (Tr. 1084.) Neither of those reasons is credible.

Although the Respondent has a shop rule that prohibits "being present in the facility during non-work hours without good cause" (G.C. Exh. 3A, page 14), the evidence shows that prior to late February 2002, that rule was seldom enforced. Indeed, the unrebutted evidence shows that employees, like Turney, bought and sold candy and other items before and after their shifts in working and non-working areas. (Tr. 231-233.) Thus, Ortiz' reliance on the shop rule as a valid reason for prohibiting Turney from remaining in the plant after his shift ended is misplaced.

The evidence further shows that prior to the start of the Union organizing campaign the Respondent took no action to restrict access to the plant after normal working hours, even though there was vandalism. Ortiz testified that someone purportedly broke into the accounting department in January 2002. (Tr. 1066.) There is no evidence that the Respondent subsequently sought to enforce the shop rule. Supervisor Brandon Reed testified that although most employees leave the facility within five minutes after their shift ends, there is nothing that has ever been posted or distributed to the employees telling them how long they can remain. (Tr. 687.) He stated that prior to February 2002, he never disciplined anyone for staying in the plant. When asked if he ever saw any employees in the plant during non-working hours, he responded, "I couldn't tell you whether that occurred before or not. I guess I never really paid any attention to it." (Tr. 675.) The credible evidence supports a reasonable inference that the only time management started paying attention to who remained in the plant after their shift ended, was after the Union organizing campaign began. Further, the evidence shows that the post-Union organizing vandalism to which Ortiz referred was the so-called vandalism in the shipping department which, as noted above, was at best exaggerated. (Tr. 1066.)

I find that the evidence, viewed as a whole, shows that the real reason for prohibiting Turney from being in the plant after his shift ended was because of the Union campaign and that after February 15, the Respondent sought to strictly enforce its shop rules. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 12(a) of the amended complaint.

13. The February 28 unlawful statement of futility

Paragraph 12(b) of the amended complaint alleges that in the same February 28 conversation between Ortiz and Turney, she told Turney "this was [a] non-Union plant, and it was going to remain that way. And I said at that time that she has her opinion and I had mine." (Tr. 243.) Ortiz did not specifically deny making this statement to Turney.

The Respondent asserts that Ortiz was merely expressing a preference to remain non-Union, which is protected by Section 8(c) of the Act. First, I find that the statement was a declaration, and not a mere expression of preference. Next, the credible evidence shows that her statement was made in the context of telling Turney that he was required to leave the plant because of the Union campaign, which was unlawful. Thus, Ortiz' comment was coupled with a statement that violated the Act. *Hickory Creek Nursing Home,* 295 NLRB 1144, 1148 (1989), affd sub nom. *NLRB v. Health Care Management Corp.,* 917 F. 2d 1304 (6th Cir. 1990). Under these circumstances, I find that Ortiz' statement violated Section 8(a)(1) of the Act as alleged in paragraph 12(b) of the amended complaint.

14. The unlawful confiscation and disposal of Union literature

Paragraph 14(h) of the amended complaint alleges that on March 6, 2002, Supervisor Dale Potter disparately confiscated and disposed of Union literature in the employee break room. The credible evidence shows that on March 6, third shift employee Bill Tregoning placed Union flyers on a table in the break room three times during the night. Each time he returned to the break room for lunch or a break, he found the Union literature in the trash. The third time, he placed the Union literature on a table, he immediately returned to the break room and saw Supervisor Dale Potter throwing the Union literature in the trashcan. (Tr. 92, 105.) I find that the disposal of the Union literature in the break room interfered with the employees Section 7 rights. Accordingly, I find that the Respondent violated the Section 8(a)(1) of the Act as alleged in paragraph 14(h) of the amended complaint.

15. The alleged threat of discharge

Paragraph 16(b) of the amended complaint alleges that on March 15, 2002, Supervisor Ricky Arthur unlawfully threatened Employee Mark Cook by telling him that General Manager Joe Barry was out to fire him because of his Union activities. The allegation was based solely on the testimony of Cook, which I did not credit for the reasons stated above. In absence of any credible evidence to support the allegation, I shall recommend that paragraph 16(b) be dismissed.

16. The unlawful prohibition on discussing discipline

Paragraphs 9(c) and 12(c) of the amended complaint allege that in a disciplinary meeting on March 18, 2002, Supervisor Zoe Burns and Operations Manager Valerie Ortiz, gave Employee Lisa Cogswell a formal warning and instructed her not to discuss her discipline with anyone. The unrebutted testimony of Cogswell is that Ortiz told her, "you are not to discuss this with anyone." (Tr. 464.) Burns likewise testified that, "I told Lisa not discuss her discipline with other employees while she was working. She was interrupting production." (Tr. 1022.) There is no evidence that other employees were similarly restricted from talking to each other during working hours. Nor did the Respondent introduce any evidence showing that there was a substantial and legitimate business justification for the prohibition. *Desert Palace, Inc.,* 336 NLRB No. 19, slip op. page 2 (2001). Accordingly, I find that the Respondent violation Section 8(a)(1) of the Act.

17. The alleged implied threats concerning the R&D cell

Paragraph 16(c) of the amended complaint alleges that on March 20, 2002, Supervisor Ricky Arthur unlawfully threatened Employee Antonio Jeffries by telling him that the Company was removing the R&D cell from the plant in order to scare the employees. Arthur credibly denied the allegation. Jeffries' testimony is uncorroborated. In the absence of any credible evidence to support the allegation, I shall recommend the dismissal of paragraph 16(c).

Paragraph 14(i) of the amended complaint alleges that on March 21, 2002, a Company supervisor unlawfully implied that if R&D cell would not return to the plant because of the Union activity. The evidence shows that on March 21, the R&D cell was removed from the plant. Later that evening, Employee Bill Shembarger told Supervisor Dale Potter that he was sorry that the machine was removed because the maintenance department had been using it for spare parts. He stated that Potter responded that two weeks earlier Ortiz had told him that the machine would be moved to another plant. (Tr. 405.) The undisputed evidence shows that Potter did not

state why the machine was being moved, and Shembarger did not ask. Based on this evidence, it cannot be inferred that the machine was removed because of Union activity. Accordingly, I shall recommend the dismissal of paragraph 14(i) of the amended complaint.

Paragraph 15(b) of the amended complaint alleges that on March 22, 2002, Supervisor Jon Brant unlawfully threatened Employee James McPeak by telling him that the R&D cell would not be returned to the plant if the Union was selected. McPeak's testimony was uncorroborated and contradicted by another employee who purportedly was present when the statement was made. In the absence of any credible evidence to support the allegation, I shall recommend the dismissal of paragraph 15(b) of the amended complaint.

18. The March 23 unlawful distribution of anti-union literature

Paragraph 17(a) of the amended complaint alleges that in late March 2002, Supervisor Preston Estep unlawfully insisted that Employee Lisa Cogswell take a pro-Company flyer that he was passing out. Cogswell's credible testimony shows that Estep was standing nearby the time clock handing out anti-union literature. When she attempted to walk by without taking the literature, Estep called out her name, came after her, and handed the literature to her. (Tr. 467.) In *A.O. Smith Automotive Products Co.,* 315 NLRB 994 (1994), the Board found that by having its supervisors directly offer employees antiunion paraphernalia, the employer effectively put employees in a position of having to accept or reject the information and thereby make an observable choice that would reveal something about their union sentiments. Here, Supervisor Estep directly handed out anti-union literature to an employee, which standing alone is unlawful. In addition, he called out Cogswell's name, chased after her, and insisted that she accept the flyer. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act in accordance with the allegations in paragraph 17(a) of the amended complaint.

19. The alleged threat to reduce wages if the Union was selected

Paragraph 12(d) of the amended complaint alleges that on March 29, 2002, Valerie Ortiz called Employee Randall Penley into her office, and in the presence of Supervisor Potter, told Penley that his wage rate would be reduced if the Union was selected. Penley at first testified that Ortiz told him that he "was going to lose anywhere from $2.00 to $2.30 an hour if the Union came in." (Tr. 156.) Seconds later, he testified that she told him "if the Union got voted in that I was possibly going to lose at least $2.00 an hour or more." With a little more probing, he stated that Ortiz made this statement while reading from a document which indicated that his wage rate could be lowered if the Union was selected. He conceded that is all that was discussed at the meeting.

Contrary to the General Counsel's assertions, the evidence viewed as whole reflects that Ortiz told Penley that his wages could, not would, be lowered if the Union was selected and that the statement was made in the context of explaining that collective-bargaining could result in contract provisions which require a wage reduction when an employee transfers or is demoted to a lower paying job. I find that the statement did not constitute a threat of reduced wages. Accordingly, I shall recommend the dismissal of paragraph 12(d) of the amended complaint.

20. The alleged March 29 unlawful distribution of anti-union literature

Paragraph 12(e) of the amended complaint is very specific. It alleges that on March 29, 2002, the Respondent unlawfully polled employees regarding their union support "by directing a subordinate to make a record of employees who refused to accept Respondent's campaign literature." In support of this allegation, the General Counsel asserts that as Employee Bill

Shembarger was approaching the time clock on March 29, he declined to accept anti-union literature being handed out by Supervisors Wall and Potter. It further asserts that at the same time, Operations Manager Ortiz walked by, observed Shembarger refuse to take the literature, and told the supervisors to "mark that down." The General Counsel's relies solely on Shembarger's uncorroborated testimony, which I have declined to credit for reasons stated above. Accordingly, in the absence of any evidence to support this allegation, I shall recommend the dismissal of the allegation in paragraph 12(e) of the amended complaint.

21. The unlawful distribution of anti-union literature on April 1, 2002

Paragraph 17(c) of the amended complaint alleges that on April 5, 2002, the date of the union election, the Respondent's supervisor read aloud an anti-union flyer to an employee who had refused to accept a copy. The credible evidence shows that on or about April 1, a few days before the election, Supervisor Preston Estep approached long time employee, Henry Baker, who was working on the catwalk of the furnace. According to the undisputed evidence, Estep interrupted Baker by reading to him those portions of an anti-union flyer that Estep had highlighted in yellow. The content of the portions read concerned plant closings at other Union represented facilities. Asked whether he told Estep that he did not want the flyer, Baker credibly stated, "I do not remember just coming out and saying, I do not want it. You know, he is a Supervisor I respected. That is why I just listened. I just listened to it, you know." (Tr. 357.) The undisputed evidence shows that after Estep finished reading the flyer to Baker, he gave him the flyer. (Tr. 755.)

The evidence discloses that Baker felt obligated and constrained to remain silent while Estep read the flyer to him, for fear that he would upset a supervisor. By reading the flyer to him, Estep placed Baker in an untenable position of listening to Estep or telling him to stop thereby making a demonstrative choice that would reveal something about his union sentiments. *Accord, Circuit City Stores,* 324 NLRB 147 (1997). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act when Estep read aloud the flyer to Baker.

22. The alleged unlawful attempt to secure Bud Tebo's vote

Paragraph 9(d) of the amended complaint alleges that on April 1, 2002, Project Manager Zoe Burns made an unlawful unspecified promise of benefit to Employee Bud Tebo by asking him what it would take to secure his vote against the Union. Tebo's testimony was uncorroborated and Burns credibly denied making the statement. I therefore credited her denial. In the absence of any credible evidence to support the allegation, I shall recommend the dismissal of paragraph 9(d).

23. The unlawful threat by Lester Irbin that efforts to select a union would be futile

Paragraph 19 of the amended complaint essentially alleges that in group employee meetings held a few days before the election, Human Resources Manager Les Irbin told employees that there would be no union at Intermet-Stevensville, thereby implying that the efforts to select a union would be futile. The credible testimony of the three employees shows that in course of answering employee questions about the number of Intermet plants that were unionized, Irbin made the comment that Intermet-Stevensville would not be one of them. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in the amended complaint.

24. The unlawful interrogation of Craig Reynolds

Paragraph 12(g) of the amended complaint alleges that on or about June 20, 2002, Operations Manager Valerie Ortiz coercively interrogated job applicant Craig Reynolds concerning his former union membership, activities, and sympathies.

In *Rochester Cadet Cleaners, Inc.,* 205 NLRB 773 (1973), the Board stated:

> The Board has held that questions concerning former union membership and union preference, in the context of a job application interview, are inherently coercive, without accompanying threats (sic), and are therefore violative of Section 8(a)(1) of the Act, even when the interviewee is Subsequently hired. *Bendix-Westinghouse Automotive Air Brake Co.,* 161 NLRB 789, 791-792.

See also, *Bighorn Beverage,* 236 NLRB 736, 751 (1978).

Reynolds' credible testimony, as corroborated by a transcript and tape recording of the conversation, shows that mid-way through the employment interview, Ortiz stated, "I guess one of the things we probably should have started with is we are a nonunion work force, our plan is we will remain a nonunion workforce, **so I don't know how your feelings are** and what kind of (inaudible)." (Emphasis added.) Reynolds responded, "I worked for, one time when I worked for MJ Ferguson, I had to be … (cough) I had to get in the building trades union as a laborer to work for them, that's how it worked for them, till the job was over, with generators and the … at the Cook plant, we were mainly laborers.. or the grunts." (G.C. Exh. 47, page 8, 15:4-15:5.) The evidence supports a reasonable inference that Ortiz was asking Reynolds to express his feelings about unions and whether he worked for any unionized employers in the past.

Under these circumstances, I find that Ortiz' question during a job interview violated Section 8(a)(1) of the Act.

The Respondent nevertheless argues that no violation occurred because under Section 8(c) of the Act Ortiz was entitled to state that the Respondent was nonunion and planned on remaining nonunion. While that may be true, Ortiz' went beyond any Section 8(c) protection when she solicited Reynolds to express his opinion about and experiences with union, i.e., "so I don't know how your feelings are."

B. *Section 8(a)(3) Violations*

1. The legal standard

Section 8(a)(3) of the Act prohibits an employer from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labor organization." In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that the

employee's protected activity was a motivating factor in the employer's decision.[52] The General Counsel must show protected activity, animus, or hostility, and adverse action that tends to encourage or discourage protected activity. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of evidence that the employee would have been discharged regardless of the protected activity. *T & J Trucking Co.,* 316 NLRB 771 (1995).

2. The alleged unlawful issuance of documented warnings on February 15

Paragraph 21 of the amended complaint alleges that on or about February 15, the Respondent unlawfully issued documented warnings to 13 employees for failing to clock in and/or out. The General Counsel argues that the Respondent's policy requiring employees to punch in and out was sporadically and laxly enforced, until it became aware of the Union organizing campaign, which precipitated a more stringent enforcement of the policy. It asserts that the timing of the warnings supports a reasonable inference that they were issued in order to discourage support for the Union. It further asserts that in order to satisfy its initial *Wright Line* burden, it does not have to show a correlation between each employee's union activity and his warning. *ACTIV Industries,* 277 NLRB 356, fn. 3 (1985).

The unrebutted evidence shows that for many years the Respondent had a problem with employees failing to punch in and out. Its policy requiring all employees to clock in and out was sporadically enforced. (Tr. 999-1000; R. Exh. 63-70.) In 2001, a computerized slide card time system was installed, but some employees continued failing to swipe their electronic identification cards. On December 20, 2001, the Respondent posted memo on employee bulletin boards, which stated in pertinent part:

TIME CLOCK

> There have been several cases of employees forgetting to clock in and out. Failure to punch in and out at the start and end of the shift or when leaving the plant, or failure to punch in and out at the start and end of the lunch period may be cause for discipline. When you do not punch in and out correctly, it also causes payroll to spend more time in processing your paycheck as well as could cause you to be paid incorrectly.

(R. Exh. 4.)

The memo was posted from December 20, 2001 through January 7, 2002.

The unrebutted evidence further shows that on January 7, Project Manager Zoe Burns sent an e-mail to Ortiz asking who was going to track and discipline employees for failing to clock in and out. (R. Exh. 14.) Burns testified that an employee under her supervision, named Antonio Jeffries, had failed to clock in or out on January 4. (Tr. 937.) She further testified that this was a recurring problem with Jeffries. (Tr. 1030.) However, when she asked the human resources manager, Rick Swem, if he was going to issue a warning, Swem told her that it was the manager's responsibility to keep track and discipline the employees. Burns raised the issue

[52] *Manno Electric, Inc.,* 321 NLRB 278, 280, fn.12 (1996).

with her boss, Ortiz, who disagreed with Swem. She told Burns that it was human resources' responsibility to handle the discipline, and that they would take care of it. Burns therefore did not pursue the matter. (Tr. 940.)

According to Ortiz' unrebutted testimony, Human Resources Manager Rick Swem left the Company in mid-February 2002.[53] His duties were taken over by Accounting Assistant, Karen Welch. Around the same time, Ortiz was informed that Swem had failed to issue several warnings to employees who had failed to clock in or out. (Tr. 1074-1075.) Although Swem had prepared the warnings, some of the warnings contained inaccurate information, which Ortiz corrected herself on February 14. (R. Exh. 80.) She then issued the corrected warnings on February 15. (Tr. 1076-1077.)

I find that the General Counsel has satisfied its initial burden of proof. Specifically, the evidence shows that there was lax enforcement of the Respondent's policy, and that even after the December 20 memo was posted, there was no disciplinary action taken to enforce the policy until one day after the Respondent learned about the Union organizing drive. The timing of the warnings supports a reasonable inference that the discipline was motivated by an intent to discourage union activity.

However, the evidence also shows that the decision to discipline employees for failing to clock in and out was made before the Respondent knew that a Union organizing drive was underway. The unrebutted testimony of Ortiz and Burns is that in early January 2002, they discussed who was responsible for enforcing the policy that had recently been posted and Ortiz clarified that the discipline would be issued by the human resources department. The unrebutted evidence also shows that before Human Resources Manager Swem stopped working for the Respondent sometime prior to February 14, but before doing so he began preparing the warnings. The credible evidence shows that when Ortiz learned that Swem had not completed the task, she took over the job, corrected some minor mistakes, and issued the warning the next day, February 15. I find that the key factor is not when the warnings were issued, but rather when the decision to discipline was made and when the implementation of that decision began. The evidence, viewed as a whole, shows that the decision to discipline was made and the implementation began prior to the date the Respondent learned of the Union drive.

The General Counsel nevertheless argues that the Respondent never had any intention of disciplining employees for a single missed punch, which is the offense involved in a majority of the warnings. It relies on the first sentence of the Burns e-mail to Ortiz which states, "Per the memo posted we are going to discipline employees with excessive missed punches…." (R. Exh. 14.) The December 20 memo does not limit discipline to "excessive missed punches." Nor does the evidence supports such an interpretation. To the contrary, Burns credibly testified that the memo "was aimed at anybody not punching in and punching out" and stated that "if somebody missed a punch, a punch in or punch out, then it would be taken into the discipline action." (Tr. 1030.) She further explained that when she wrote her e-mail she was referring to Employee Antonio Jeffries who had a problem with not punching in and out. Ortiz likewise testified that employees would be disciplined was for missed punches, not solely for excessive missed punches. (Tr. 1098.)

[53] The evidence shows that Swem was employed by the Respondent from approximately November 2001 to February 2002. (Tr. 1130.)

I find that the persuasive evidence, viewed as a whole, shows that the Respondent would have disciplined the 13 employees, even in the absence of the advent of the Union organizing campaign. Accordingly, I shall recommend the dismissal of paragraph 21 of the amended complaint.

3. The February 27, 2002 unlawful discipline of Lisa Cogswell

a. *The unlawful warning*

Paragraph 22(a) of the amended complaint alleges that on February 27, Project Manager Zoe Burns unlawfully issued Employee Lisa Cogswell a documented warning for being in the plant before the start of her shift without good cause and for impending the production of another employee. (G.C. Exh. 18.) The undisputed evidence shows that on the morning of February 27, third shift Supervisor Charlie Goldfuss reported to Burns that Cogswell was in the plant at 5 a.m. walking through the maintenance department talking to Employee Bill Shembarger, who was a leading advocate of the Union. (Tr. 955; G.C. Exh. 90.) Later that morning, Burns questioned Cogswell about being in the plant prior to the start of her shift, and followed up their conversation with a written warning.

In order to satisfy its *Wright Line* evidentiary burden, the General Counsel must show that Cogswell was a Union supporter, known to the Respondent, and that because of her Union support, she received the written warning. The evidence does not show, nor does the General Counsel argue, that on or before February 27, Cogswell was a Union supporter. To the contrary, Cogswell testified that she had no involvement with the Union until mid-March 2002. (Tr. 435-437.)

The General Counsel nevertheless asserts that the Respondent suspected Cogswell of supporting the Union because she was a close friend of Employee Bill Shembarger. In this connection, the evidence shows that Shembarger and Cogswell were long time friends and co-workers, who for many years traveled to and from work together. It also shows that Shembarger was a leading Union advocate, known to the Respondent, who basically went out of his way to challenge General Manager Joe Barry during the organizing campaign. (Tr. 916, 834, 1064.) Throughout the trial, the Respondent sought to show through its witnesses that Shembarger had a personal dislike for Barry, which caused Shembarger to advocate for the Union. Significantly, the undisputed evidence shows that on February 27, Supervisor Goldfess reported to Burns[54] that Cogswell was seen talking and walking with Shembarger in the plant and that Burns made a written notation of that fact in a diary. (Tr. 955; G.C. Exh. 90). The credible evidence shows that when Burns gave Cogswell the written warning she told her not to talk to Shembarger. (Tr. 440.) Thus, I find that the credible evidence supports a reasonable inference that on February 27, the Respondent assumed that Cogswell supported the Union because of her close friendship with leading Union advocate Bill Shembarger. *Guerdon Industries,* 255 NLRB 610, 614 (1981).

In addition, the timing of warning supports a reasonable inference that the discipline was intended to discourage support for the Union. The unrebutted evidence shows that prior to February 27, Cogswell routinely came to work early and routinely stopped by the maintenance department to ascertain whether Shembarger or his supervisor, Ron Wagner, needed parts.[55]

[54] The credible evidence shows that after the Union campaign began Ortiz instructed the supervisors to "watch the floor." (Tr. 867.)

[55] The failure of the Respondent to call Supervisor Wagner to rebut this evidence or to

Continued

(Tr. 409.) The undisputed evidence shows that during this time, Cogswell was never disciplined. On February 20, the Respondent was notified that the Union filed a representation petition. On February 27, Cogswell received a written warning for doing what she had always done for more than a year. This was the first warning that Cogswell ever received in her 10-year employment history with the Respondent.

Thus, I find that the General Counsel has satisfied his *Wright Line* evidentiary burden of showing that the Respondent disciplined Cogswell in order to discourage her from supporting the Union.

In response, the Respondent asserts that Cogswell was disciplined because she violated two standing shop rules which appear in the employee handbook given to all employees. Rule No. 3 prohibits "being present in the facility during non-work hours without cause," and Rule No. 21, prohibits "restricting or retarding production or influencing other to do the same." The evidence does not show, however, that prior to the Union campaign the Respondent consistently disciplined employees for violating these rules. Instead, the only one warning was submitted by the Respondent to illustrate a violation of Rule No. 21, among other violations, that was R. Exh. 38, which on May 30, 2001, was given to Employee Henry G. Ludwig, Jr. In contrast, the evidence shows that employees, including Cogswell, were often in the plant before and after their scheduled shifts, and many of them solicited employees who were working to buy candy and other items. Thus, the evidence shows that the Respondent's enforcement of these shop rules prior to the Union campaign was lax.

Also, there is no evidence that Cogswell impeded the Shembarger's work. Supervisor Goldfuss did not report that Cogswell was interfering with Shembarger's work. Burns testified that Goldfuss informed her that Cogswell "went to the Maintenance Department and was walking through the final pack area talking with a couple of employees." (Tr. 955.) According to Cogswell's unrebutted testimony, she encountered Shembarger and co-worker Louie Miller as they were about to go on break and walked with them to the break room. (Tr. 441-442.)

Based on the evidence viewed as a whole, I find that the Respondent has failed to show that it would have issued a warning to Cogswell in the absence of the perceived support for the Union. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 22(a) of the amended complaint.

b. *The unlawful change of hours*

Paragraph 22(b) of the amended complaint alleges, and the credible evidence shows, that later that same day, February 27, Burns gave Cogswell a memo stating that her hours of work were being changed to 7:00 a.m. – 3:30 p.m. (G.C. Exh. 19.) The unrebutted testimony shows that Burns did not give Cogswell a reason for the change. At trial, Burns testified that she changed Cogswell's hours because there was no reason for her to come in early and because the Company needed to get her back on normal hours. (Tr. 960.) Burns further testified that Cogswell was needed from 3-3:30 p.m. to attend meetings and cover the stockroom. (Tr. 961.) Burns did not explain, however, why she waited until after Cogswell was seen talking to Shembarger to make the change.

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explain that it was unable to do so warrants an adverse inference that his testimony would not have been favorably to the Respondent's case.

The Respondent's *post hoc* reasons for changing Cogswell's hours are pretextual. The evidence shows that Cogswell had kept a 6:30 a.m. – 3:00 p.m. schedule for nearly five years without question or concern about work coverage. There is no credible evidence that Burns had decided or contemplated changing Cogswell's hours prior to February 27. The fact that a change in hours was suddenly announced on the same day that Burns learned that Cogswell was in the plant early talking to the principal Union supporter supports a reasonable inference that the decision was motivated by the Respondent's perception that Cogswell supported the Union. In the absence of any persuasive evidence showing that the Burns would have changed Cogswell's hours notwithstanding a Union campaign, I find that the Respondent's conduct violated Section 8(a)(3) of the Act as alleged in paragraph 22(b) of the amended complaint.

4. The unlawful documented warning to Tom Turney

Paragraph 23 of the amended complaint alleges, and the undisputed evidence shows, that on March 7, 2002, Employee Tom Turney received a written warning for remaining in the plant on February 27, after his shift ended, and for restricting and retarding the production of others. (G.C. Exh. 17.) The Respondent argues that the General Counsel has failed to satisfy his *Wright Line* evidentiary burden and therefore the allegation should be dismissed. Specifically, it asserts that the General Counsel has failed to show that, Brandon Reed, the supervisor who issued the written warning to Turney knew that Turney supported the Union and was motivated to issue discipline because of that reason.

The General Counsel's evidence shows that Turney was an active Union supporter. He solicited employee signatures for the Union petition in the parking lot of the plant and in work areas during working hours. (Tr. 222-225.) The evidence also discloses that Turney was closely watched by management. Supervisor Potter gave a note to Ortiz reporting that on three occasions he had seen Turney in the plant after his shift ended. A few days later, on February 27, Supervisor Brandt confronted Turney for being in the plant after his shift ended, telling him "you're not to be in the plant, because I've heard about you." (Tr. 239.) Brandt also documented the fact that Turney was in the plant after working hours. The unrebutted evidence shows that the next day, when Turney went to Ortiz' office to complain that he felt like he was being watched by management, he got into a debate with Ortiz about whether or not the plant was going to remain non-union. (Tr. 243.) The credible evidence therefore shows that Ortiz was aware that Turney supported the Union.

Notably, ten days later, Turney received a written warning from supervisor, Brandon Reed, who had no involvement or personal knowledge of Turney being in the plant after work hours on February 27.[56] Reed testified that he learned that Turney had violated a shop rule from Supervisor Dale Potter and a second shift supervisor, presumably Jon Brandt. (Tr. 685.) He further testified that he was instructed by Operations Manager Ortiz, the second highest management official in the Company, to issue the written warning to Turney. (Tr. 685.) Contrary to the Respondent's assertions, and based on this undisputed evidence, I find that Turney was an active Union supporter known to the management official who decided to issue the discipline, i.e., Operations Manager Valerie Ortiz.

Ample evidence also exists that Turney received a warning in order to discourage his Union activity.[57] Despite the Respondent's shop rules prohibiting employees from being in the

[56] The Respondent did not explain why it took ten days to give Turney a written warning or why Reed and not Brandt issued the warning.

[57] There is also ample evidence that the Respondent opposed the Union.

plant during non-working hours and from impeding the work of others, the enforcement of the rules was lax. Supervisor Brandon Reed admitted that before Tom Turney, he was unaware of any other employees who had violated the rules. (Tr. 685.) Yet, the unrebutted evidence shows that prior to the Union campaign, employees came to work early and stayed after their shifts ended to solicit other employees, some of who were working, to buy candy and other items. (Tr. 231-234.) The unrebutted evidence further shows that supervisors were aware of this activity. There is no evidence, however, that any supervisors documented when these employees were in the plant or that these employees were reported to Ortiz. Indeed, Supervisor Brandon Reed testified that prior to February 27, he never paid any attention to employees in the plant during non-working hours and never issued any discipline for that type of conduct. (Tr. 675.) Supervisor Jon Brandt testified that he did not discipline Turney when the incident occurred on February 27 because "it wasn't that big of an offense" and he did think it was worthy of discipline. (Tr. 865.) Given the lax enforcement of the shop rules, and the inconsistent treatment of Turney after the Union campaign began, I find that Turney, a known Union supporter, was issued a written warning in order to discourage his Union activity. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 23 of the amended complaint.

5. The unlawful restriction of access to the front office

Paragraph 24 of the amended complaint alleges, and the undisputed evidence shows, that on March 8, Burns informed Cogswell by memo that she was no longer permitted in the plant's front office without permission and that the job duties that she typically performed in the front office such as printing and photocopying were to be performed in the shipping department office and manufacturing department office, respectively. (G. C. 20.) Burns testified that she made the decision to restrict traffic in the front office, after consulting General Manager Joe Barry, because the front offices had been broken into and computers had been tampered with. (Tr. 961.) She testified that "we had break-ins in the Shipping Department, the stockroom. I had personally had my computer files deleted off the computer, and there had been previously, at the end of the year before, we had had a couple of break-ins and money stolen out of the front office." (Tr. 963.) The articulated reasons for banning Cogswell from the front office are unpersuasive.

There is no evidence that the Respondent took any precautions against vandalism after someone purportedly stole money from the front office in late December 2001. There is no testimony that the supervisors were told to "watch the floor" or to be alert to suspicious activity until after the Union campaign began in mid-February 2002. There is no evidence that a memo was issued to the employees restricting their access to the front office. Rather, the evidence shows that the Respondent did nothing for two months and then restricted the access of one person to the front office, Lisa Cogswell, who was the only employee to receive a memo advising her that "[t]he only time you should be in the front office is during a scheduled meeting, when asked to come to the front office for a discussion or to meet with a vendor in the lobby."

The Respondent asserts that after the Union campaign began there were other incidents of vandalism that justified its action. For example, on February 26, someone purportedly broke into the stockroom office. The undisputed evidence shows, however, that it was Cogswell who immediately reported that the doorframe to the stockroom office had been damaged and that a list of employees was missing. (Tr. 1040-1041.) One week later, the Respondent inexplicably banned from the front office, the one, and only employee, to report an actual occurrence of vandalism, after taking no action against vandalism for more than two months. The Respondent's conduct calls into question its true motivation for restricting Cogswell from the front office.

The only other incident of so-called vandalism relied upon by the Respondent took place in the shipping department. As explained above, however, there is no credible evidence that the shipping department office actually was entered by force. Supervisor Arthur testified that he had gone in and out of his office, and locked and unlocked his office door, several times before someone pointed out to him that there were scratches around the door latch. Based on those scratches, he speculated that someone broke into his office. He also admitted that whatever files were deleted from his computer could have been deleted from another computer terminal in the plant.[58]

Indeed, the Respondent's own evidence undercuts its articulated defense of vandalism in the shipping department. The March 8 memo directs Cogswell to use the shipping department office for printing out purchase orders. The very same office, where only a week or so before, Supervisor Arthur placed new locks on the office door and banned employees from taking their breaks because he was concerned about "vandalism." (G.C. Exh. 20.) If the Respondent's decision to restrict Cogswell from entering the front office was truly motivated by a desire to prevent vandalism, why did it direct her to use the shipping department office which purportedly was vandalized only a week earlier?

The evidence viewed as a whole shows that the Respondent's articulated reason for restricting Cogswell from the front office are inconsistent and inexplicable. I find that a more plausible explanation for its conduct is that after Cogswell was reported walking and talking to Shembarger in the early morning hours of February 27, the Respondent suspected that she supported the Union, and wanted to keep her out of the front office. I find that the Respondent's reason for restricting her access to the front office was pretextual. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 24 of the amended complaint.

6. The unlawful warning, demotion, and reduction in pay of Lisa Cogswell

Paragraphs 25 and 26 of the amended complaint allege, and the undisputed evidence shows, that on March 18, Facilities Manager Burns gave Employee Lisa Cogswell a written warning for poor performance and poor attitude, and at the same time removed her working supervisor duties. Sixty days later, or on May 20, 2002, Burns gave Cogswell a performance review and transferred her to a finishing technician position with a $1.00 reduction in pay. (Tr. 981;G.C. Exh. 21 and 23.)

a. *The formal warning and change of duties*

In addition to being a known close friend of Union advocate Bill Shembarger, the evidence shows that Cogswell began wearing a Union button to work in early to mid-March 2002. Around the same time, Burns issued the "Formal Written Documented Warning:Performance and Attitude" to Cogswell. It covered a period from early January through mid-March 2002 and addressed approximately five performance related incidents and two attitude incidents as a basis for the discipline, one of which was the attitude displayed by Cogswell when she received the February 27 warning for coming into the plant early. With

[58] Burns likewise conceded that the files deleted from her computer were public files, accessible and shared by other employees, and that they could have been deleted from a computer terminal anywhere in the plant. (Tr. 1038.)

respect to at least three of performance related incidents, there is no evidence that Burns discussed her concerns with Cogswell prior to issuing the formal warning. The Board has held that "[t]he failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain the circumstances are clear indicia of discriminatory intent." *New Orleans Cold Storage & Warehouse Co.,* 326 NLRB 1471, 1477 (1998). With respect to the attitude concerns expressed by Burns, the evidence shows that the Respondent has known for several years that Cogswell has difficulty getting along with co-workers and despite that deficit, it took no corrective disciplinary action until after the Union campaign began. Rather, prior to 2002, Cogswell's work performance was consistently rated above average, despite the comments that she needed to improve her interpersonal skills. (R. Exh. 23 & 24.)

Two other factors reflect that the disciplinary action was motivated by a discriminatory intent. First, the timing of the discipline in conjunction with Cogswell's outward manifestation of support for the Union supports a reasonable inference that the formal warning was intended to discourage that her support. The evidence shows that Cogswell began wearing a Union button to work in early – mid-March 2002, and almost immediately received a formal warning.

Second, the evidence shows that the Respondent failed to follow its own procedures for issuing discipline. According to the Respondent's employee handbook and disciplinary forms, an employee should receive a documented warning for a first incident and a formal written warning for a second incident. (G.C. Exh. 3, page 14; R. Exh. 29.) The examples of discipline submitted by the Respondent reflect that this procedure has been routinely followed in the past and that in some cases the employee received a verbal warning prior to a documented warning. (R. Exh. 29; R. Exhs. 31, 38 and 33; R. Exh. 39; and R. Exh. 44.) For example, in R. Exh. 39, the supervisor pointed out that "[w]ithin the last thirteen months, March has received a verbal warning (1/5/00), a written warning (2/22/00), and a suspension (6/28/00) for similar incidents." R. Exh. 44 disclosures that the employee there had received "several warnings, verbal and documented, regarding unacceptable behavior, including arguing, refusing to work, being uncooperative, and yelling at other employees." The Respondent did not follow this procedure with Cogswell.

Instead, Cogswell received a documented warning on February 27 for a matter unrelated to performance and attitude, i.e., coming into the plant early, which was the very first warning of any type that she received in more than ten years of employment with the Respondent. The undisputed evidence shows that on March 18 the Respondent gave Cogswell a "Formal Written Documented Warning" deviating from its normal procedures and melding the first and second disciplinary steps. (G.C. Exh. 23.) For all of these reasons, I find that the Respondent has failed to persuasively show that it would have disciplined Cogswell in this manner and changed her duties, even in the absence of the Union activity.

Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 25 of the amended complaint.

b. The unlawful 60-day performance review and pay reduction

On May 20, Cogswell received an unfavorable 60-day review and was transferred to another position with a reduction in pay. The evidence shows that the 60-day review was required by the March 18 formal warning. In other words, the unlawful March 18 formal warning precipitated the 60-day review and the adverse action that followed. The Respondent should not be permitted to rely upon its own unlawful conduct to effectuate a transfer and pay reduction. There is no evidence that in the absence of the unlawful formal warning that

preceded and precipitated the 60-day review, Cogswell would have received a transfer and pay reduction. To the contrary, the evidence shows that prior to the Union organizing drive, Cogswell's received above-average performance reviews, despite her poor attitude, and was never disciplined. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 26 of the amended complaint.

C. *The Refusal to Bargain*

Paragraphs 28 – 33 and 36 of the amended complaint allege that as of February 20, 2002, the Union became the exclusive representative of the employees in an appropriate bargaining unit based on a valid card majority. It is further asserted that despite the Union's letter, dated February 20, demanding recognition and requesting to bargain, the Respondent unlawfully refused to recognize the Union, and instead committed several unfair labor practices designed to destroy the Union's majority status. In response, the Respondent asserts that the Union did not have the requisite majority status because (1) the petition contains names that were not signed or dated; (2) the petition contains names that were stricken at the request of employee; and (3) several employee signatures were obtained by misrepresentation.

1. The appropriate bargaining unit

The parties agree that the following constitutes the unit appropriate for purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by Respondent at its facility located at 2800 Yasdick Drive, Stevensville, Michigan; but excluding all office clerical employees, salaried employees, guards and supervisors as defined in the Act.

They have also stipulated that there were 79 employees in the bargaining unit as of February 20, 2002, and that the names that appear on the Union's authorization petition were all bargaining unit employees, except for Ron London. (Tr. 8; 584-585; G.C. Exh. 37 and 2(a)-(k).)

2. The majority status

There are 58 names on the Union's authorization petition, excluding Ron London. Five of the names do not have employee signatures.[59] (G.C. Exh. 2(c).) The General Counsel does not argue that these five employees should be included in the majority status. I shall exclude them. The names of two other employees, Charles Ricketts and Ben Cribley, were crossed out by Union Business Agent Ken Bieber. (G.C. Exh. 2(e) and 2(f).) Union supporter Tom Turney testified that he solicited the signatures of both Ricketts and Cribley. Ricketts signed the petition on February 12. One day later, he asked Turney to remove his name from the petition. (Tr. 228-229.) Cribley signed the petition on February 13, and soon afterwards asked Turney to remove his name. (Tr. 230.) Because Turney already had turned in the petition, he advised Bieber that the employees wanted their names removed. Bieber crossed off the two names.

The General Counsel argues that the revocations are ineffective because they were the product of the Respondent's unfair labor practices. *Dlubak Corp.,* 307 NLRB 1138, 1174 (1992). I disagree. There is no evidence that the Respondent had committed any unfair labor practices

[59] Philip Lee, Everett Lumpkins, Larlie Miller, Glen Rodgers, and Mike Wall.

at the time either employee asked that his name be removed from the petition.[60] The evidence shows that the first unfair labor practice was committed by the Respondent in response to the organizing drive on February 15. On that date, General Manager Barry ordered that the bulletin boards in the break room be taken down. The evidence shows that Ricketts asked to have his name removed from the petition prior to that date and Bieber removed his name. The evidence further shows that Cribley signed the petition on February 13, and asked to have his name removed soon thereafter, although Turney could not recall the exact date. (Tr. 430.) In the absence of any evidence to the contrary, I find that Turney's testimony supports a reasonable inference that Cribley asked to remove his name from the petition before February 15, and in accordance with that request, Bieber crossed out his name. The fact that Bieber promptly crossed out both names is persuasive evidence that the signatures were effectively revoked. Accordingly, I find that the signatures of Charles Ricketts and Ben Cribley were effectively revoked.

A third employee, Betty Scott, signed the petition on February 15, 2002. She testified that she subsequently asked Employee Bill Shembarger to remove her name because "I wanted to think about it, and I didn't necessarily want my name on there because I'm not, you know, I don't know nothing about this." (Tr. 630.) Her name was not crossed off the petition. There is no evidence that she followed up with other requests or that she made any effort to contact the Union directly, either orally or in writing, to ask that her name be removed from the petition. I find that by failing to take any steps to ensure that her name had been removed she acquiesced to the use of her name on the petition.

Of the 51 remaining names on the petition, the Respondent argues that several of those signatures should be excluded because they were obtained by misrepresentation. In *NLRB v. Gissel Packing Co., Inc.,* 395 U.S. 575 (1969), the Supreme Court stated "that [the] employees should be bound by the clear language of what they sign unless the language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above the signature." Id. at 606. It further stated that "there is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will be used to first get an election… We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else." Id. at 607-608. Whether a signature on a card or petition was obtained by misrepresentation is a matter akin to an affirmative defense to be proved by the Respondent. *Cato Show Printing Co.,* 219 NLRB 739, 755 (1975).

Each sheet of the Union's petition clearly states in the upper left-hand corner:

WE ARE THE UNION!

We the undersigned employees of

INTERMET

authorize the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW to represent us in collective bargaining. We also authorize the UAW to use our names and this petition to show our

[60] Nor is there any evidence that the Union demanded recognition prior to the date the employees asked to have their names removed. *Dlubak Corp.,* supra, 307 NLRB at 1174.

support for the union.

The Respondent asserts that the signatures of employees, Jimmy McPeak and Michael Meade, are invalid because they were told they were signing he petition in order to get an election. Both employees were called by the General Counsel in order to authenticate their signatures, which they did. Neither sought to revoke his signature. Nor is there any evidence that they were told that signing the petition was "only" to get an election.

I find that the Respondent has failed to show that McPeak was told that he was signing the petition only to get an election in contravention of the plain language of the petition.

The Respondent asserts that three other employees, who signed the petition, were told that they were signing it in order to obtain information about the Union: Janice Arnold; Ron Bates; and Philip Lee. These employees were called as witnesses by the Respondent. All testified that they were told that they were signing the petition in order to receive information about the Union. Janice Arnold testified, "[t]o the best of my knowledge, I thought that he said that it was to get information from the Union." (Tr. 770.) She did not read the petition before signing and could not remember if getting information was one of several things that Turney told her would happen. (Tr. 771.) She conceded that Turney could have told her that she was signing the petition for other reasons. I find that the evidence falls short of showing that Arnold was told that she was signing the petition only to get information about the Union.

Ron Bates testified that he went to the maintenance department to sign the petition. (Tr. 649 - 650.) He stated that he told fellow employee, Don Winnell, that he wanted to sign the petition. (Tr. 650.) He believed that was the first thing that was said in the conversation between he and Winnell. (Tr. 650.) Bates then was asked: "[a]nd what did Mr. Winnell say to you after you signed the petition, if anything?" Bates responded, "That I would just receive information." (Tr. 650.) He equivocated, however, about whether Winnell told him that he would receive information before or after he signed the petition, and eventually stated, "I can't really recall which one said it first." (Tr. 651.) On redirect by Respondent's counsel, he testified that it was his intention to receive information on the Union when he went to sign the petition, but he did not testify whether he read the petition before signing it or whether anyone told him that it was only to receive information. I find that the evidence falls short of show that before signing the petition Bates was told that he was signing only to receive information.

Phillip Lee also testified that he was in the plant parking lot in a big crowd when he signed the petition on the hood of someone's car. (Tr. 692-693.) He could not recall who gave him the petition to sign, but someone told him "[I]t's not for an official vote or nothing like that. It's simply to get more information sent to you by the Union about the Union." (Tr. 689-690, 692.) He testified that he "kind of" read the petition before signing it, but was in a hurry to get out of there. I find that the evidence fails to show that Lee was misled to sign the petition by a Union adherent with words calculated to direct him to disregard the clear language of the petition.

Based on the evidence viewed as a whole, I find that the Respondent has failed to prove that these employees were misled to sign the petition. I further find that on February 20, 2002, the Union represented a majority of the employees in the appropriate bargaining unit referenced above.

3. The appropriateness of a bargaining order

The General Counsel argues that a *Gissel* bargaining order should be issued to remedy the Respondent's unfair labor practices. In *Gissel,* the Supreme Court held that the Board has

authority to issue a bargaining order in two types of cases. Those marked by outrageous and pervasive unfair labor practices (category I cases) and those less extraordinary cases marked by the less pervasive practices which nonetheless still have the tendency to undermine the majority strength and impede the election processes (category II cases). The Court further stated that there was a third category of minor or less extensive unfair labor practices which, because of their minimal impact on the election machinery, will not sustain a bargaining order (category III cases). Although the General Counsel has not specified which category of cases applies here, it intimates, without explicitly stating, that the unfair labor practices the Respondent committed fall into the second category rather than the first.

Certain violations called "hallmark" violations have been regularly regarded by the Board and the courts as highly coercive and their presence support the issuance of a bargaining order. Hallmark violations include the closing of a plant or threats of plant closure or loss of employment, the grant of benefits to employees, or the reassignment, demotion or discharge of union adherents in violation of Section 8(a)(3) of the Act. *NLRB v. Jamaica Towning, Inc.,* 632 F.2d 208, 212-213 (2d Cir. 1980). The Respondent's conduct here involves the following hallmark violations: a threat made by Supervisor Brandon Reed to Kristie Cramatie that if the Union were selected it could mean the loss of jobs; a threat by Supervisor Dale Potter to Bill Shembarger that if an employee was caught bringing Union literature into the plant, he would be suspended and escorted out of the plant by the police; a threat by Supervisor Dale Potter to Tom Turney, in the presence of two other employees that health insurance premiums would increase if the Union was selected; and a threat by Supervisor Dale Potter to Bill Shembarger that General Manager Joe Barry would shut down the plant if the Union was selected. Other hallmark violations resulting from completed actions include a documented warning to Lisa Cogswell from Project Manager Zoe Burns for being in the plant before her shift began; a documented warning to Tom Turney from Supervisor Brandon Reed, acting at the direction of Operations Manager Valerie Ortiz, for being in the plant after the end of his shift; a change in the work hours of Lisa Cogswell by Project Manager Zoe Burns; a restriction on Lisa Cogswell's access to the front offices; a formal warning and removal of working supervisory duties of Lisa Cogswell by Project Manager Zoe Burns; and the transfer and reduction of pay of Lisa Cogswell by Project Manager Zoe Burns.

The Respondent also committed other serious and pervasive unfair labor practices that affected all the employees. It removed the bulletin boards from the employee break room immediately upon learning that a Union organizing drive was imminent; prohibited the practice of employees taking breaks in the shipping department area; prohibited the practice of employees taking breaks in the quality lab; confiscated and disposed of Union literature on a table in the break room; and told groups of employees through Corporate Human Resources Manager Les Irbin shortly before the election that it would be futile to organize a union. The evidence, viewed as a whole, shows that by these unlawful activities the Respondent sought to limit the flow of information about the Union to and between the employees during the organizing campaign and endeavored to convey the message that their efforts to organize a Union were futile.

This conduct is consistent with other unlawful activities which, in and of themselves, do not rise to the level of a hallmark violations, but certainly in the aggregate, and when coupled with other serious and pervasive unfair labor practices reflect that outward support for the Union would not be tolerated and individual support for the Union was being probed and monitored. These unlawful activities include Operations Manager Ortiz telling Kristie Cramatie to remove her Union button, telling her not to bring Union buttons and materials into the plant, and interrogating her about other employees who supported the Union. Supervisor Dale Potter telling Tom Turney to remove his Union button. Supervisor Brandon Reed giving Tom Turney

the impression that he was under surveillance. Operations Manager Valerie Ortiz telling Cramatie and Turney that it was futile to support the Union. Supervisor Preston Estep forcing Lisa Cogswell to accept anti-union literature and reading anti-union literature to Henry Baker.

Three of the Respondent's highest-ranking management officials were involved in this unlawful activity throughout the organizing campaign. Corporate Human Resources Manager Les Irbin told different groups of employees shortly before the election that it would be futile to select a union. Operations Manger Valerie Ortiz, who is the number two management official at the plant, was directly involved in instituting several of the unlawful activities. Project Manager Zoe Burns, another high-ranking supervisor, directed the unlawful activity resulting in the Section 8(a)(3) violations concerning Lisa Cogswell. A fourth, Supervisor Dale Potter had elevated management status because he testified that he is the person in control of the plant on the third shift. The evidence shows that Potter perpetrated a number of threats directed at Union advocates Bill Shembarger and Tom Turney.

The evidence further shows that in the aftermath of the election, the Respondent committed additional unfair labor practices which undermine the possibility of holding a fair second election. A month after the election, Project Manager Burns demoted and reduced the pay of Lisa Cogswell, a decision that initially was precipitated by an unlawful formal warning. In June 2002, Operations Manager Valerie Ortiz unlawfully questioned job applicant, Craig Reynolds, about his "feelings" about unions, pointing out to him that the Respondent was non-union and intended on remaining that way. At trial, Ortiz incredulously denied questioning Reynolds, only to be impeached by a record transcript. Ortiz' unlawful conduct, coupled with her unconvincing denial of wrongdoing, makes it unlikely that the coercive and lingering effects of the Respondent's unlawful activities would be erased by the passage of time, or that the Respondent will refrain from such activities in the future.

The Board has repeatedly held that the validity of a *Gissel* order depends on an evaluation of the situation as of the time the employer committed the unfair labor practice violations. *Cogburn Healthcare Center,* 335 NLRB No. 105, slip op. at page 5 (2001). I find that the Respondent's hallmark violations, coupled with the other serious and pervasive violations, and several unlawful activities carried out by high-ranking management officials render this a category II case, and warrant a bargaining order remedy.

I further find, based on the evidence viewed as a whole, that the Respondent violated Section 8(a)(5) of the Act, by refusing to recognize and bargain with the Union on February 20, 2002, based on the Union's majority status, while at the same time it embarked on a campaign of unlawful activities which were intended to undermine the Union's majority.

D. *The Union's Objections to Conduct of Election*

On April 5, 2002, the employees voted 37 to 38 against Union representation. On April 12, 2002, the Union filed 26 objections to the conduct of the election. On May 30, 2002, it withdrew objections 18, 21 and 22. The closeness of the election requires the careful scrutiny of these objections. *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995); *Colquest Energy, Inc. v. NLRB,* 965 F. 2d 116, 122 (6th Cir. 1992).

Most of the remaining objections track the unfair labor practice allegations in the amended complaint and my findings above. Specifically, I sustain Objections 1, 2, 4 – 14, 15 in part, 20, 23, and 26.

In the "Brief of the Charging Union-Petitioner," the Union does not specify which of the

remaining objections ought to be sustained. Rather, in broad terms it argues three points with respect to the Respondent's anti-union campaign: that the Respondent engaged in objectionable conduct (1) by predicting, without objective factual basis, that loss of work was a likely consequence if the Union was elected; (2) by claiming that there was a "100% chance" of a strike if the Union was elected; and (3) by interrupting the employees' direct deposit paychecks.

The first two points appear to be encompassed by Objection 25, that asserts that the Respondent "[c]onducted a campaign of fear and intimidation through constant predictions of violence, strikes, loss of customers and economic detriment, which inevitably result from a union victory." With respect to point one, the evidence fails to shows that the Respondent repeatedly asserted that there would be a loss of jobs if the Union was selected. Although Supervisor Brandon Reed made such a statement to one employee, Kristie Cramatie, the Charging Union-Petitioner has not pointed out multiple references to a "loss of customers or jobs." To the contrary, General Manager Barry pointed out in at least one of his speeches that "I am not saying that we will lose present customers or prospective customers if the UAW wins. I don't know." (C.P. Exh. 8, page 4.) Accordingly, I decline to sustain Objection 25 on this basis.

With respect to point two, the evidence shows that the reference to a "100 chance" of there being a strike is taken out of context of a letter to all employees, dated March 25, 2002, in which the Respondent describes the Union's strike activity over the past 15 years, pointing out to the employees that "each UAW member would have had a 100% chance of being subjected to a UAW strike during this period…." (C.P. Exh. 18.) The letter points out, however, that "[n]o one can predict whether there would be a strike in the future here at our plant, if the union wins the election. Whether there would ever be a labor strike at INTERMET, Stevensville, in the event the union wins, would depend on many factors, many of which the Company might not have any control." (C.P. Exh. 18, page 2.) Other materials, like a speech by General Manager Barry, also discuss the possibility of a strike but caution, "PLEASE DO NOT MISUNDERSTAND WHAT WE ARE SAYING. WE ARE NOT SAYING A STRIKE WOULD OCCUR IF THE UAW WERE TO REPRESENT YOU." (C.P. Exh. 4, page 2.) Although the possibility of a strike was a central theme in the Respondent's anti-union campaign, the evidence does not reflect that it was portrayed as a forgone conclusion as argued by the Charging Union-Petitioner. I therefore decline to sustain Objection 25 on this basis.

With respect to Objection 19, the evidence shows that on March 28, 2002, which was five days before the election, the employees who had authorized the direct deposit of their paychecks had their paychecks minus two hours of pay deposited directly, and were given a separate check for the two hours of pay, along with a notice from the Respondent stating, among other things, that nothing was missing from their pay, "but if the UAW is voted in, you will be required to pay the 2 hours of your pay each month, and the UAW will expect to have it deducted from your paycheck each and every month and sent to the UAW Union." (Tr. 61, 92, 412;C.P. Exh. 3.) The Charging Union-Petitioner argues that a paycheck direct deposit is a term and condition of employment and that by withholding the two hours of pay from direct deposit and issuing it in a separate check, the Respondent unlawfully changed the employees' terms and conditions of employment.

In *Kalin Construction Co.,* 321 NLRB 649, 652 (1996), the established a rule prohibiting changes in the paycheck process, for the purpose of influencing the employees' vote in the election, during a period beginning 24 hours before the scheduled opening of polls and ending with the closing of the polls. After defining the term paycheck process, the Board held that it would set aside an election, if there is a change in any of the defined elements during the proscribed period, absent a showing that the change was motivated by a legitimate business

reason unrelated to the election. The change here took place five days before the election. It only occurred once. Only two hours pay was withheld from direct deposit. I decline to sustain Objection 19.

CONCLUSIONS OF LAW

1. The Respondent Cast-Matic Corporation d/b/a Intermet Stevensville is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

2. The International Union, United Automobile, Aerospace and Agricultural Implement of America (UAW), AFL-CIO (Union) is a labor organization within the meaning of Section 2(5) the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Promulgating and maintaining an overly broad no-solicitation/distribution rule.

(b) Promulgating and maintaining a resolution opportunity programs that prohibits employees from acting in concert concerning matters affecting their terms and conditions of employment.

(c) Removing the employee bulletin boards in the break room.

(d) Telling employees to remove their Union buttons.

(e) Prohibiting employees from brining Union buttons and Union literature into the Intermet Stevensville facility.

(f) Interrogating employees about their Union support and Union activities.

(g) Telling employees that it is futile to organize and support the Union.

(h) Telling employees that if the Union is selected it could result in the loss of jobs.

(i) Prohibiting employees from taking their breaks in places other than the employee break room because of the Union organizing campaign.

(j) Prohibiting employees from discussing the Respondent's unlawful conduct.

(k) Telling the employees that health insurance premiums will increase if the Union is selected.

(l) Telling employees that their performance review was delayed because of the Union.

(m) Telling employees that anyone who brought Union materials into the Intermet Stevensville facility would be suspended and escorted off the property by the police.

(n) Telling employees that the Intermet Stevensville facility would shut down if the Union was selected.

(o) Telling employees that the management was not afraid to break the law to keep the

Union out.

(p) Telling employees that the Respondent would not re-install the PCP machine if the Union was selected.

(q) Creating an impression of surveillance of union activities.

(r) Prohibiting employees from being in the Intermet Stevensville facility before and after their shifts because of the Union organizing campaign.

(s) Confiscating and disposing of Union literature.

(t) Forcing employees to accept anti-union literature.

(u) Interrogating applicants for employment about their Union sentiments.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct:

(a) Issuing a documented warning to Lisa Cogswell based on the perception that she supported the Union.

(b) Changing the work hours of Lisa Cogswell based on the perception that she supported the Union.

(c) Issuing a documented warning to Thomas Turney because of his Union support.

(d) Restricting Lisa Cogswell's access to the front office based on the perception that she supported the Union.

(e) Issuing a formal warning to Lisa Cogswell because of her Union support.

(f) Transferring Lisa Cogswell and reducing her pay because of her Union support.

5. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by Respondent at its facility located at 2800 Yasdick Drive, Stevensville, Michigan; but excluding all office clerical employees, salaried employees, guards and supervisors as defined in the Act.

6. Since February 20, 2002, a majority of the employees in the above unit signed union authorization cards designating and selecting the Union as their representative for the purposes of collective bargaining with Respondent.

7. Since February 20, 2002, and continuing to date, the Union has been the representative for the purpose of collective bargaining of the employees in the above described unit and by virtue of Section 9(a) of the Act has been and is now the exclusive representative of the employees in said unit for the purpose of collective bargaining with respect to rates of pay wages hours of employment and other terms and conditions of employment.

8. Since February 20, 2002, and continuing to date, the Union has requested and continues to request the Respondent to recognize and bargain collectively with respect to rates of pay wages, hours of employment and other terms and conditions of employment as the exclusive representative of all employees of Respondent in the above described unit.

9. Since February 20, 2002, and at all times thereafter, the Respondent has failed and refused to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of all employees in the above described unit.

10. The Respondent has violated Section 8(a)(5) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of all employees in the above described unit.

11. The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of the Section 8(a)(1), (3) and (5) and Section 2(6) and (7) of the Act.

12. The Respondent did not otherwise engage in any other unfair labor practice alleged in the amended complaint in violation of the Act.

13. The Charging Union-Petitioners' objections 1, 2, 4 – 14, 15 in part, 20, 23 and 26 are sustained and constitute objectionable conduct affecting the results of the representation election held on April 5, 2002, in Case GR–7–RC–22184. All other objections are overruled.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent disciplined Thomas Turney in violation of Section 8(a)(3) of the Act, I shall recommend that the Respondent be ordered to remove from its files any reference to the unlawful discipline. Having found that the Respondent disciplined Lisa Cogswell, removed her working supervisory duties, transferred her to another position and reduced her pay, all in violation of Section 8(a)(3) of the Act, I shall recommend that the Respondent be ordered to reinstate Lisa Cogswell to the position that she held on February 26, 2002, without prejudice to her seniority or other rights and privileges, or if any such position does not exist, to a substantially equivalent position, dismissing if necessary any employee hired to fill said position, and to make Lisa Cogswell whole for any loss of earnings and other benefits she may have suffered, computed on a quarterly basis, less any interim earnings, as prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). I shall further recommend that the Respondent be ordered to remove from its files any reference to the unlawful discipline of Lisa Cogswell.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[61]

[61] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec.

Continued

ORDER

The Respondent, Cast-Matic Corporation, d/b/a Intermet Stevensville, Stevensville, Michigan, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Promulgating and maintaining an overly broad no-solicitation/distribution rule.

(b) Promulgating and maintaining a resolution opportunity programs that prohibits employees from acting in concert concerning matters affecting their terms and conditions of employment.

(c) Removing the employee bulletin boards in the break room.

(d) Telling employees to remove their Union buttons.

(e) Prohibiting employees from brining Union buttons and Union literature into the Intermet Stevensville facility.

(f) Interrogating employees about their Union support and Union activities.

(g) Telling employees that it is futile to organize and support the Union.

(h) Telling employees that if the Union is selected it could result in the loss of jobs.

(i) Prohibiting employees from taking their breaks in places other than the employee break room because of the Union organizing campaign.

(j) Prohibiting employees from discussing the Respondent's unlawful conduct.

(k) Telling the employees that health insurance premiums will increase if the Union is selected.

(l) Telling employees that their performance review was delayed because of the Union.

(m) Telling employees that anyone who brought Union materials into the Intermet Stevensville facility would be suspended and escorted off the property by the police.

(n) Telling employees that the Intermet Stevensville facility would shut down if the Union was selected.

(o) Telling employees that the management was not afraid to break the law to keep the Union out.

(p) Telling employees that the Respondent would not re-install the PCP machine if the Union was selected.

(q) Creating an impression of surveillance of union activities.

102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(r) Prohibiting employees from being in the Intermet Stevensville facility before and after their shifts because of the Union organizing campaign.

(s) Confiscating and disposing of Union literature.

(t) Forcing employees to accept anti-union literature.

(u) Interrogating applicants for employment about their Union sentiments.

(v) Issuing formal and documented warnings to employees because of their Union support or the perception that they support the Union.

(w) Changing the work hours of employees based on the perception that they support the Union.

(x) Restricting employee access to the front office based on the perception that they support the Union.

(y) Changing work duties, transferring and reducing the pay of employees because they support the Union.

(z) Refusing to bargain with the Union as the exclusive collective-bargaining representative of employees in the unit set forth below.

(aa) In any other manner interfering with restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer Lisa Cogswell full reinstatement to the position she held on February 26, 2002 or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Lisa Cogswell whole for any loss of earnings and other benefits she suffered as a result of the unlawful discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful discipline of Thomas Turney and Lisa Cogswell; and within 3 days thereafter, notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(d) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

> All full-time and regular part-time production and maintenance employees employed by Respondent at its facility located at 2800 Yasdick Drive, Stevensville, Michigan; but excluding all office clerical employees, salaried employees, guards and

supervisors as defined in the Act.

(e) Preserve and, within 14 days of a request, or such additional time as The Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents all payroll records social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by Region 7, post at its various facilities in Stevensville, Michigan copies of the attached notice marked "Appendix."[33] Copies of the attached notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of the business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 2002.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election held in Cases GR–7–RC-22184 is set aside and that the representation petition in that case be dismissed.

Dated, Washington, D.C. May 16, 2003

C. Richard Miserendino
Administrative Law Judge

[33] If this Order is enforce by a judgment of a United States court of appeals the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."